(13)

JUL 5 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 229

STANLEY TAYLOR, *Petitioner,*

vs.

UNITED STATES OF AMERICA.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

C. M. WALTER of WALTER & BROWN,
JOHN C. STIRRAT,
Counsel for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
pinion and Proceedings Below	1
risdiction	2
uestions Presented	2
atutes Involved	3
atement	4
pecification of Errors to Be Urged	10
easons for Granting the Writ	12
onclusion	22

Table of Authorities Cited

Cases

Pages

Connally v. General Construction Co., 269 U. S. 385, 70 L. Ed. 324 19

Frisby v. U. S. (C. C. A. 4th, 1912), 38 App. D. C. 22, 37 L. R. A. (N. S.) 96 21

Hickman v. Jones, 76 U. S. 197, 9 Wall. 197, 19 L. Ed. 551 16
Hodges v. Easton, 1 S. Ct. 307, 106 U. S. 408, 27 L. Ed. 169 15

Jacob v. New York City, 315 U. S. 752, 86 L. Ed. 1166..... 16

Lanzetta v. State of New Jersey, 306 U. S. 451, 83 L. Ed. 888 19

Patton v. U. S., 30 F. 2d 1015.....20, 21
Patton v. U. S., 281 U. S. 276, 74 L. Ed. 854, 50 S. Ct. 253.. 20

Ranney v. Barlow, 5 S. Ct. 104, 112 U. S. 207, 28 L. Ed. 662 15

Taylor v. Brown, 137 F. 2d 654, cert. den. Nov. 15, 1943, 64 S. Ct. 194..... 9n

U. S. v. Cohen Grocery Co., 255 U. S. 81, 65 L. Ed. 516.... 19
U. S. v. Hall (C. C. A. Pa. 1809), 2 Wash. 366, 6 Cranch 171, 3 L. Ed. 189..... 21
United States v. Union Pacific Railroad Company, 98 U. S. 569, 25 L. Ed. 143..... 16

Yakus v. United States, 64 S. Ct. 660, 88 L. Ed. 653.....3n, 15

Codes

Emergency Price Control Act of 1942 (Public Law 421, 77th Congress):
- Section 2 15
- Section 4 .....3, 4, 9
- Section 202 15

Pages
Section 203 ..... 2, 3, 8
Section 204 ..... 2, 3, 8, 11, 12
Section 205 ..... 3, 4, 10, 11, 16, 18

Judicial Code, Section 250(a) 2

Miscellaneous

United States Constitution, Article I, Section 9, Clause 3... 21

Maximum Rent Regulation No. 28:
Section 1388.1804 ..... 3, 7n, 16n, 17, 19
Section 1388.1805 ..... 11, 16, 17
Section 1388.1806 ..... 4n
Section 1388.1809 ..... 10, 21

Official OPA Interpretation 4(d)-I 16

Official OPA Interpretation 5(a)(1)-I 11, 13, 16, 17

P. & F. OPA Service 622:72, 4 C.C.H. 51,778 at 51,780..... 18

Rules of Practice and Procedure, Rule XIII 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

STANLEY TAYLOR, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Stanley Taylor, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above cause on April 26, 1944.

The petitioner files herewith as an exhibit hereto a duly certified transcript and supplemental transcript of the record in the case as the same appears in the United States Circuit Court of Appeals.

Opinion and Proceedings Below.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R. 225, Garrecht and Healy,

Circuit Judges, and McCormick, District Judge) is not yet reported. Subsequent to such opinion, a motion to dismiss the proceedings and to discharge the petitioner on ground of lack of jurisdiction of the subject matter was made and denied on June 12, 1944 (Supp. R.....).

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Ninth Circuit was entered April 26, 1944 (R. 250). Petition for rehearing was entertained, and was, on June 2, 1944, denied (R. 251). The statutory provision believed to sustain the jurisdiction of this Court is § 250(a) of the Judicial Code as amended. See also Rule XIII of the Rules of Practice and Procedure after Plea of Guilty, Verdict or Finding of Guilt in Criminal Cases, promulgated by this Court May 7, 1934.

Questions Presented.

1. Whether petitioner may be deprived of the right to defend on the ground that the Regulation is unconstitutional on its face when petitioner has not forfeited this right by failure to make timely assertion of the right before the tribunal having jurisdiction to determine it.[1]

2. Whether petitioner may be deprived of the defense that the Regulation is invalid by forcing him to trial and convicting him of a violation of such Regulation in a Court which is deprived of the right to consider such validity, while said petitioner is diligently seeking determination of the validity of such Regulation by the statutory procedure.[1]

3. Whether the petitioner has been denied due process of law when he was compelled to proceed to the conclusion of his criminal trial after introducing evidence that

[1] This question was expressly reserved by the United States Supreme Court in the case of *Yakus v. United States*, 64 S. Ct. 660, at 678, 88 L. Ed. 653, at 672, and as yet has not been determined.

he had duly challenged the validity of the Rent Regulation pursuant to the provisions of §§ 203 and 204 of the Emergency Price Control Act of 1942 which proceedings were then pending in the United States Emergency Court of Appeals and undetermined and that by reason thereof he had had no opportunity to establish the invalidity of the Regulation by resort to the statutory procedure.[1]

4. Whether the petitioner is guilty of wilful violation of §§ 4(a) and 205(b) of the Emergency Price Control Act of 1942 (Public Law 421, 77th Congress) by demanding or receiving the rents provided by § 1388.1804(d)(3) or (4) instead of those provided by § 1388.1804(a) of Maximum Rent Regulation No. 28.

5. Whether § 1388.1804 of Maximum Rent Regulation No. 28 is sufficiently certain to inform petitioner whether it is § 1388.1804(d)(3) or (4), or, instead, § 1388.1804(a) of Maximum Rent Regulation No. 28 which designates the maximum rents applicable to the housing accommodations in petitioner's apartment house.

6. Whether the petitioner has been denied due process of law where he relied upon the provisions of the Emergency Price Control Act of 1942 and of Maximum Rent Regulation No. 28 issued pursuant thereto in applying the maximum rents provided thereby to his property, but the trial Court failed to certify such fact to the Administrator pursuant to § 205(d) of such Act.

7. Whether petitioner has been deprived of due process of law in the proceedings herein.

Statutes Involved.

The provisions of the Emergency Price Control Act of 1942 (Public Law 421, 77th Congress) and of Maximum Rent Regulation No. 28 issued pursuant thereto, together with Interpretations of the Administrator of the Office of

Price Administration involved in this case, are set fort
in Part I of the Appendix hereof.

Statement.

An Information was filed in the District Court of th
United States for the Northern District of Californi
Southern Division, charging the petitioner with twent
violations of Sections 4(a) and 205(b) of the Emergenc
Price Control Act of 1942 (Public Law 421, 77th Co
gress); he was convicted on sixteen counts;[2] the judg
ment was affirmed by the Court below (R. 250). The pet
tioner, a layman who operated a machine shop in Sa
Francisco, was not represented by counsel at his tri
(Deft's. Exhibit 2-B, admitted in evidence R. 99; App. i
R. 208, 209). In August, 1941, he purchased an apartmen
house located and known as 530 Larkin Street, San Fra
cisco, which he and his wife have since owned as joi
tenants (R. 43). Previous to its purchase by the pet
tioner the property had been in the hands of a truste
in bankruptcy for a considerable time (R. 148). Th
building contained forty-eight apartments, seventeen
which were vacant at the time it was acquired by pet
tioner (R. 148). Of the thirty-one occupied apartment
many were occupied by transients, some of whom were
questionable character (R. 148). The rentals in many i
stances had no relation to the value of the apartments an
all were abnormally low (R. 148). There were furnishe
apartments in the building for which the rental was onl
thirty (30) dollars per month, while the rent f
comparable unfurnished apartments in the building wa
thirty-five (35) dollars per month (R. 85 and 148).

---

2 The information contained a total of twenty-one counts. Petitioner w
acquitted on the twenty-first count which alleged he had unlawfully and w
fully attempted to evict a certain tenant in violation of Maximum Re
Regulation No. 28, § 1388.1806 and § 4(b) of the Act. The remaining cou
were dismissed (R. 210).

Petitioner realized at the time he purchased the property that it was not a paying business, but acquired it believing that proper management would make it profitable (R. 148-149). A great deal of rehabilitation of the building was necessary and new management was installed (R. 149). Intending to ultimately dispose of individual apartments in the apartment house on a community apartment house basis by which each occupant would own his own apartment (R. 149), the petitioner put the property on a utility budget of $200 per month and gave his tenants written notice on November 29, 1941, that they must pay their proportionate shares of any "excess utility charges" (R. 52, 53, 149-150). The petitioner borrowed $5000 additional on the property in January, 1942, to defray the cost of its rehabilitation and gradual rehabilitation of the building was begun (R. 150). On March 1, 1942, the rents for the various apartments in the property were at least 25 per cent lower than normal for such apartments in San Francisco (R. 150).

Because the rental for many of the furnished apartments was less than the rent for the same kind and size of apartments unfurnished, petitioner decided to sell the furniture and rent the apartments unfurnished (R. 96 and 113). Mrs. Evelyn Flynn, who had been employed as manager of the apartment house, objected to the possible resulting removal of the tenants and stated that if she had money she would buy the furniture rather than see it removed (R. 96). Petitioner replied that if she wanted to be bothered with the furniture, lack of cash with which to purchase it would not prevent her from acquiring it (R. 97). The petitioner and Mrs. Flynn then executed an installment sales contract, dated June 6, 1942, by which Mrs. Flynn purchased all of the furniture in petitioner's building (R. 86-90) for $15,000 (R. 96). This was all consummated before San Francisco became

subject to any rent regulation. Written notice of the sal of such furniture was then given to each tenant (R. 64) Petitioner reduced the rental to a "basic rental" fo each unfurnished apartment and made separate charge on the basis of actual cost for utilities, cleaning, mainte nance, etc., which charges would be paid by the occu pants after conversion of the property into a commu nity apartment house (R. 149, 150-151 and 176). In eac instance such "basic rental" was materially less tha the March 1, 1942, rental for such apartment furnishe (Govt's. Exhibit 1, columns headed by months of "July to "November", inclusive, R. 46, admitted in evidenc at R. 45).[3] Mrs. Flynn arranged with the respective ten ants for the amount she would charge for the furnitur used by each tenant (Deft's. Exhibit B which is on th reverse of Defts'. Exhibit D, R. 50, 55, 56, 58, 60, 6 65, 66, 67, 68, 70 and 78). This amount, when added t the rent charged by petitioner for the unfurnished apart ments and to the utility and other charges, exceeded th rentals for such apartments when rented furnished o March 1, 1942, by $2 to $15 per month (R. 45, 46).[4]

The total of all charges for the apartments and fur niture, including charges for utilities, etc., was substan tially the same as the normal rents for such apartment in the neighborhood and in the City of San Francisc as set forth in Government's Exhibit No. 1 under th column entitled "Fair Rent Established by Tenants' Sur

---

[3] The rents shown for the respective apartments in Government Exhib No. 1 (R. 46, 45) for the months of July and November, both inclusiv are the only amounts received by petitioner as and for rent for the r spective apartments (R. 176). All other amounts added into the "Nov. I Total all Charges" shown in the column at the extreme right of the exhib were the charges, based on cost, for utilities, etc., to which were added th charges made by Mrs. Flynn for the use of her furniture (R. 46, 176).

[4] The "Fair Rent Survey" establishes the rent for Apartment 410 at $50.0 per month while the total amount actually collected by the appellant an Evelyn Flynn was $42.50 per month and not $96.50 as might be inferre from Govt's. Ex. 1 (R. 46). This apartment is the subject of Count 15 o the Information which charges petitioner with having collected a rental o $10.00 per week instead of the March 1, 1942 rental of $40.00 per month fo such apartment (R. 30, 164).

vey May & June" (R. 46). This survey was taken prior to the installation of the automatic laundry equipment and prior to the complete rehabilitation of many of the apartments (Deft's. Exhibit 2-B, App. x, admitted in evidence R. 99).

Mr. Dunlap, attorney for the Office of Price Administration, told petitioner on July 24, 1942, that the sale of the furniture did not change the apartments from fully furnished to unfurnished, but the improvements made to the building were not mentioned (R. 45, 102-103). A supplemental agreement was then executed July 31, 1942, by petitioner and Evelyn Flynn providing that if such a construction by the Office of Price Administration should prevent Mrs. Flynn from paying for the furniture, that she could return the furniture to the petitioner, as vendor, without any liability for the unpaid balance of the purchase price (R. 90-93).

Between March 1, 1942, and July 1, 1942, a laundry room and an automatic laundry, including the installation of pipes and a drain at a total cost of $500, were provided and installed in the building for the use of all tenants (R. 94, Deft's. Exhibit 2-B, App. Pt. II, pp. ix, x). No laundry accommodations had been provided for tenants in this building on March 1, 1942 (R. 98).[5] The evidence is undisputed that the installation of the laundry equipment was an added feature and saved some of the ten-

[5] The City of San Francisco, in which the property is located, was not subject to rent control until Maximum Rent Regulation No. 28 was issued by the Administrator of the Office of Price Administration on June 30, 1942, to become effective on July 1, 1942 (R. 3). Section 1388.1804(d) of Maximum Rent Regulation No. 28 provides as the maximum rents for "(3) housing accommodations changed between those dates (March 1, 1942, and July 1, 1942) from unfurnished to fully furnished or from fully furnished to unfurnished or (4) housing accommodations substantially changed between those dates by a major capital improvement as distinguished from ordinary repair, replacement and maintenance the first rent for such accommodations after such construction or change, Provided, however, that where such first rent was fixed by a lease which was in force at the time of a major capital improvement, the maximum rent shall be the first rent after termination of such lease. The Administrator may order a decrease in the maximum rent as provided in Section 1388.1805(c)."

ants as much as $5 a month on their laundry (R. 98), and that there had been considerable painting and fixing up in the apartments and that on occasion there were as many as three men employed for the purpose of painting, papering and general repairing (R. 85, 98, 150).

Apartments 101, 108, 209, 310, 406, 502, 508 and 510 which are, respectively, the subjects of Counts 1, 3, 7, 10, 12 17, 19 and 20 on each of which petitioner was convicted were each completely rehabilitated between March 1, 1942 and July 1, 1942 (Government's Exhibit No. 1, R. 46, admitted at R. 45).[6]

The petitioner filed a protest under Section 203 of the Emergency Price Control Act in the Office of Price Administration on August 27, 1942 (R. 115, 116, Deft's. Exhibit 2-I), which was denied October 1, 1942 (R. 119, 120). Pursuant to Section 204 of the Act, petitioner then filed a complaint with the United States Emergency Court of Appeals on October 23, 1942, which was admitted in evidence (R. 122, Deft's. Exhibit 2-O, R. 123-147). In these proceedings the petitioner challenged the validity of Maximum Rent Regulation No. 28 and of Procedural Regulation No. 3. Petitioner's complaint so filed by him in the United States Emergency Court of Appeals in which he requested a hearing and permission to submit evidence by

---

[6] A "major capital improvement" by reason of "complete rehabilitation" was not claimed for Apartment 203 to which the Court below refers in its opinion (R. 236) nor was such claim made on behalf of any of the apartments except those enumerated above and designated by the letter "C" under the column entitled "Complete Rehabilitation" on Govt's. Ex. 1 (R. 46). However, all of such remaining apartments, except Apartment 410, received at least some items of additional furniture since March 1, 1942, while the laundry room and its equipment installed between the dates of March 1, 1942, and July 1, 1942, benefited and served as an improvement to each apartment in the building (R. 46, 94). There were only fifteen out of the forty-eight apartments which did not receive some additional furnishings after March 1, 1942 (R. 179).

affidavit or testimony of witnesses, was pending and undecided at the time of his criminal trial (R. 122, 147).[7]

Petitioner was precluded at the trial from showing the unconstitutional taking of his property without just compensation therefor and without due process of law upon which he maintained that the Regulation was invalid (R. 122, 178).

Confronted with threats of continuous litigation (R. 161, 164) and denied any administrative ruling or interview by the Office of Price Administration (R. 164, 165), the petitioner sought to discontinue renting the apartments under § 4(d) of the Act, but was restrained by the District Court from doing so in contempt proceedings brought against him by the Administrator (R. 161-162, 169-170).

On December 11, 1942, one week after petitioner's attempt to withdraw the apartment house from the rental market, the Information was filed in the District Court.

No order or notice establishing the maximum rent for the apartments or the rent for the furniture, nor any warning notice from the Office of Price Administration had been given either to the petitioner or Evelyn Flynn notifying them that the first rents charged after making such improvements were not the proper maximum rents (R. 95, 180). The first notice to petitioner that his rents were considered improper was the service on him of a preliminary restraining order which was after the alleged violations had occurred (R. 159-160, 162).

During the trial one of the jurors was reported absent, whereupon the trial Court stated that such juror was

---

[7] The Emergency Court of Appeals rendered its decision on petitioner's complaint on July 15, 1943, *Taylor v. Brown*, 137 F. 2d 654, cert. den. Nov. 15, 1943, 64 S. Ct. 194. In rendering its decision in that case the Court stated at the end of the first paragraph: "We are thus called upon to consider the constitutional validity of the Act and Regulation *generally and without regard to their particular application to the complainant.*" (Italics added.)

unavoidably detained and, without any explanation, asked petitioner whether the case might be tried by eleven jurors to which the petitioner, who was not represented by counsel, answered, "Yes, your Honor" (R. 95).

Although the petitioner's defense was that he had complied with the provisions of Maximum Rent Regulation No. 28 and of the Act in establishing rents for his apartments (R. 113, 152, 157-158, 177-178), the trial Court failed to certify such fact to the Administrator of the Office of Price Administration as required by the last sentence of § 205(d) of the Emergency Price Control Act of 1942.

The jury recommended leniency on all counts on which they found the petitioner guilty (R. 208).

Specification of Errors to be Urged.

The Court below erred, as follows:

1. In sustaining the judgment of conviction.

2. In making an *ex post facto* application of §1388.1809 of Maximum Rent Regulation No. 28 to petitioner.

3. By invading the province of the jury in resting its decision upon its own finding of fact adverse to the petitioner upon the very question of fact specifically and erroneously withheld from the jury by the trial Court.

4. In arriving at its decision upon issues not available to it in view of the issues framed by the trial Court, and the exclusion of evidence and instructions to the jury.

5. In holding that a layman, not represented by counsel, may waive his constitutional right to a jury of twelve members where such defendant had not been informed by the court or the government that he had such constitutional right.

6. In sustaining the trial Court's error in disclosing to the jury its opinion that petitioner was guilty as charged.

7. In sustaining the trial Court's refusal to instruct the jury concerning the provisions of §1388.1805(d) of the Regulation and of §§ 205(e) and 205(f)(2) of the Act as requested by the petitioner.

8. In sustaining the trial Court's error in failing to instruct the jury concerning the petitioner's defense of good faith under §205(d) of the Act.

9. In determining contrary to the Official Office of Price Administration's Interpretation 5(a)(1)-I that improvements made by petitioner did not constitute Major Capital Improvements.

10. In sustaining the judgment of conviction by holding that there had been no change in petitioner's apartments from fully furnished to unfurnished and in holding there had been no major capital improvements made thereto, contrary to the undisputed evidence of Government's Exhibit No. 1 (R. 46) and contrary to the trial Court's ruling thereon which precluded petitioner from submitting detailed evidence thereof (R. 94).

11. In sustaining the trial Court's admission of irrelevant and immaterial evidence, over the objection of the petitioner, showing that major capital improvements had not been made after July 1, 1942, the admission of which could only confuse the jury.

12. In failing to strictly construe the provisions of the Act, Regulation and Official Interpretations thereof and in failing to adopt that interpretation thereof which is most favorable to the accused where more than one reasonable interpretation of such provisions is possible.

13. In failing to grant the motion to dismiss the criminal proceedings and to discharge the appellant for lack of jurisdiction thereof by reason of the fact that such court was deprived by §204(d) of the Act of jurisdiction to consider questions of law determinative of the case

which questions had been properly raised by petitioner but had never been determined or passed upon by a Court of competent jurisdiction.

14. In failing to reverse the judgment of the district court for its error in denying the defendant's motion to quash the Information.

Reasons Relied on for Granting the Writ.

1. The Circuit Court of Appeals has decided the following important questions of federal law which have not been, but should be, settled by this court:

(a) The Court has deprived petitioner of the defense that the Regulation which he was accused of violating is unconstitutional on its face (R. 248).

(b) The Court has also deprived petitioner of the defense that the Regulation under which he was charged was invalid as applied to petitioner in the circumstances of this case, notwithstanding that petitioner was forced to trial and convicted of violating such Regulation while he was then diligently seeking determination of its validity by the statutory procedure provided in the enabling Act (R. 248).

Each of these questions arising under §204(d) of the Emergency Price Control Act of 1942 was specifically reserved by this Honorable Court in the case of *Yakus v. United States,* 64 S. Ct. 660 at 678, 88 L. Ed. 653 at 672.

2. The Court below has decided the federal questions presented as (a) and (b) above in a way probably in conflict with applicable decisions of this Honorable Court, for although this Court reserved these questions in *Yakus v. United States,* supra, this Court held in the same paragraph of its opinion in which these questions were reserved:[8]

[8] 64 S. Ct. at page 678, 88 L. Ed. at page 672.

"Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure, would be reviewable on appeal on constitutional grounds."

3. The decision of the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the lower Court, as to call for an exercise of this Honorable Court's power of supervision as to the following matters:

Petitioner is not guilty. The facts are set out in the Statement, ante.

(a) The capital improvements made by petitioner are admitted, and that they comply with the Official Interpretation 5(a)(1)-1 defining Major Capital Improvements has not been denied. However, the trial Court submitted the question as to whether there had been any such improvements to the jury, and the Circuit Court, in order to sustain the conviction, has introduced into the determination of this question, considerations involving the purposes of the Act, the number of the apartments, the amount the rent was raised and the alleged temporary use of the facilities —not one of which considerations is set forth in the Interpretation defining major capital improvements upon which the public is required to rely (R. 236-238).

(b) Regardless of any consideration of the major capital improvements, the petitioner is not guilty as charged by the Information unless the amounts charged by a third party, Evelyn Flynn, for the rental of her furniture is imputed to the petitioner and added to the amounts collected on his behalf for the rental of the unfurnished apartments (R. 46, 180).

The lower court accepted in evidence Government's Exhibit No. 1 which establishes a complete defense for petitioner on every count, by reason of the Major Capital Improvements and changes from furnished to **unfurnished** there evidenced, and by reason of the further fact that the exhibit clearly shows that the amounts charged and received by petitioner as and for rent of the apartments in question in each instance were lower than the rents charged on March 1, 1942. The column entitled "November 1st Total all Charges" shown at the extreme right of this exhibit does not represent the rents which petitioner demanded and received from his tenants as and for rent, but includes charges made by Evelyn Flynn for the use of her furniture and charges for utilities and services including the use of laundry equipment which were not provided on March 1, 1942.[9]

When petitioner offered to prove each item of information contained in Government's Exhibit No. 1 (R. 46) the Court stated that the exhibit was in evidence showing changes made in the various apartments, major improvements, whether unfurnished and whether there had been complete rehabilitation and that the exhibit would be given to the jury and ruled that it was not necessary for the witness to testify to each item (R. 94).

The Circuit Court of Appeals used the Government's Exhibit No. 1 only for comparison of the March 1, 1942, rents with the "Nov. 1st Total (of) all Charges", but ignored Exhibit No. 1 as to the "Major Capital Improvements" and the "Nov. (1)" rents for the unfurnished apartments shown thereon. Such use of this exhibit is

[9] Insofar as petitioner received any sums of money paid by the tenants to Mrs. Flynn for the use of her furniture, he received the same as payments on account of the purchase price of said furniture and not as rent (R. 97, 180).

inconsistent with the ruling of the trial Court precluding other evidence of changes and major capital improvements (R. 94).

The trial Court later removed from the case the question of whether there had been a change of the apartments from furnished to unfurnished by instructing the jury to "disregard evidence relating to said change of ownership" (R. 190), but did not question either the validity of the sale of the furniture or the change of ownership thereof. It is difficult, therefore, to understand how petitioner may be held criminally responsible for charges made by Evelyn Flynn for the use or rental of her furniture.

The Circuit Court of Appeals in its opinion seeks to cure this obvious defect by holding,

> "that the transaction between defendant and Mrs. Flynn reflected by the two instruments of agreement . . . is more in the nature of a contrivance to circumvent the operation of the Emergency Price Control Act in the Larkin Street apartment house than of a forthright sale of the furniture and furnishings in such property."

This question having been withheld from the jury, the Circuit Court of Appeals may not invade the province of the jury by substituting its own finding of fact to a question or defense so withheld from the jury.

> *Hodges v. Easton*, 1 S. Ct. 307, 106 U. S. 408, 27 L. Ed. 169.

> "It was the duty of the court to submit to the consideration of the jury the testimony adduced by the defendant to sustain the defenses set up in his answer, and the charge should be based on the hypothesis that the defenses which the testimony tended to prove were proven."
>
> *Ranney v. Barlow*, 5 S. Ct. 104, 112 U. S. 207, 28 L. Ed. 662.

"Questions of fact should be submitted to the jury and it is not proper for the court to wrest one part of a case, more than any other, from the exercise of their judgment."

Hickman v. Jones, 76 U. S. 197, 9 Wall. 197, 19 L. Ed. 551.

"Without doubt the case is close and a jury might find either way. But that is no reason for a court to usurp the function of a jury."

Jacob v. New York City, 315 U. S. 752, 756, 86 L. Ed. 1166, at 1170.

The lower Court lacked jurisdiction to question the contract of sale of the furniture. *United States v. Union Pacific Railroad Company*, 98 U. S. 569, 25 L. Ed. 143.

(c) The Circuit Court of Appeals has departed from the established rule of construction that where two or more reasonable interpretations of a statute or regulation are possible the one most favorable to the accused in a criminal trial must be adopted. This was done in its consideration of the Major Capital Improvement, § 1388.1805(d) of the Regulation, and § 205(f)(2) of the Act.

The improvement made fits with exactitude every test of Official Interpretation 5(a)(1)-1 promulgated by the Office of Price Administration for the determination of this question.[10]

The lower Court held that § 1388.1805(d) of the Regulation has no relevancy to this case (R. 239). This is entirely opposed and contrary to Official OPA Interpretation 4(d)-1[11] entitled—"Procedure Where

---

10 Under the division of structural addition in Interpretation 5(a)(1)-1 the following language is used:

"The addition need not necessarily be a part of the structure, but might also include a new garage or the installation of sidewalks. If the improvement has resulted in some added feature which did not exist prior to the change of a kind which would normally result in an increase in the rental value, then it would be a substantial change by a major capital improvement."

11 4(d) of the Housing Regulation which is referred to in this Interpretation is § 1388.1804(d) of Maximum Rent Regulation No. 28.

There Is Doubt as to Whether a Major Capital Improvement Has Occurred", which provides in part as follows:

"Where the question whether there has been a major capital improvement is a close one, the landlord may not wish to take the risks involved in making his own determination of the question. In such a situation there is, within the meaning of Section 5(d),[12] doubt concerning a 'fact necessary to the determination of the maximum rent'. The Rent Director on his own initiative may determine this fact for purposes of establishing the maximum rent."

Section 1388.1805(d) of the Regulation reads:

"If the rent on the date determining the maximum rent, or any other fact necessary to the determination of the maximum rent, is in dispute between the landlord and the tenant, or is in doubt, or is not known, the Administrator on petition of the landlord filed within 30 days after the effective date of regulation, or at any time on his own initiative, may enter an order fixing the maximum rent by determining such fact; or if the Administrator is unable to ascertain such fact he shall enter the order on the basis of the rent which he finds was generally prevailing in the defense-rental area for comparable housing accommodations on the maximum rent date."

Thus it will be seen that petitioner had only thirty days in which to file a petition seeking a determination of whether his improvements constituted "major capital improvements" while the Administrator may make such determination on his own initiative at any time. Having no doubt that his improvements were major capital improvements within the meaning of § 1388.1804(d)(4) of the Regulation as defined in the Office of Price Administration Official Interpretation 5(a)(1)-1, the petitioner was not expected to file such a petition within the thirty days allowed for the purpose and did not do so. On the other hand, the Administrator has not made any determination on his own

[12] § 5 (d) of the Housing Regulation is designated as § 1388.1805 (d) of Maximum Rent Regulation No. 28.

initiative as to whether or not the improvements made
the petitioner on his property were major capital impro
ments. It would have been the duty of the Administra
to determine this if there was any doubt in his mind c
cerning the matter.

In construing § 205(f)(2) of the Act as applying only
licenses, the Court has overlooked the alternative provisi
thereof which reads "*or* has violated any of the provisi
of any regulation, order, or requirement under sectio
or section 202(b) . . . which is applicable to such pers
a warning notice shall be sent by registered mail to s
person". This alternative provision is separate and
tinct from the first alternative which is the one applica
in the case of licenses as provided in subdivision (f)(1)
the section.

Unless this second alternative clause does require
warning notice to persons who have violated "any of
provisions of any regulation . . . under section 2 or
tion 202(b) of the Act" it is obvious that no meaning
given to this provision enacted by Congress because
first alternative phrase alone fully covers all violations
licenses. To ignore the alternative provision referred t
a refusal to give any effect or meaning to this provis
of the Act, contrary to the fundamental rules of statut
construction.

4. Although the precise question has not as yet b
decided by other Circuit Courts, certiorari should
granted because the decision concerning the major cap
improvements is in conflict with a decision of the Un
States District Court for the District of Utah (Febru
15, 1943, reported in P. & F. O. P. A. Service 622:7
C.C.H. 51,778 at 51,780) in which such District Court
(at page 622:75) that the installation of a new drain
necting with the sewer, establishing a handrail on the
stairs, and the installation of an automatic gas heater,
properly classified as major capital improvements
cause they are in excess of what might be called

repairs", and refused to grant an injunction as prayed by the Administrator on two counts which concerned the housing accommodations in which such major capital improvements had been made.

5. The decision of the Circuit Court of Appeals as to the vagueness and lack of certainty of § 1388.1804 of Maximum Rent Regulation No. 28 to inform a person of common intelligence who had made improvements to his rental property just which maximum rent therein was properly applicable, by holding that any doubts respecting rents which should have been charged were "effectually answered by the regulations" (R. 240), is a decision of a federal question in a way probably in conflict with applicable decisions of this Court.

Such penal statutes have been held by this Court to violate the due process clause of the United States Constitution in the cases of *Connally v. General Construction Co.*, 269 U. S. 385, 70 L. Ed. 324; *Lanzetta v. State of New Jersey*, 306 U. S. 451, 83 L. Ed. 888, and *U. S. v. Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516.

It was not only reasonable but it was more logical under the circumstances of the instant case for the petitioner to apply to the property the rentals provided under subdivision (d)(4) of § 1388.1804 instead of those provided by subdivision (a) thereof.

As stated in the case of *Connally v. General Construction Co.*, supra:

> ". . . The dividing line between what is lawful and unlawful can not be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a puishment

for their violation, should not admit of such double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

6. The decision of the Circuit Court of Appeals as to the waiver by a defendant who is not represented by counsel in a criminal trial of the absence of a juror when not informed by the trial Court or the government either that he need not make such waiver or that his refusal to do so would result in the eventuality of a mistrial by holding that his assent to continuing the trial with only eleven jurors under such circumstances was a free and intelligent waiver is a decision of a federal question in a way probably in conflict with the applicable decisions of this Court.

This Court has given the test by which a defendant may consent to a waiver of a jury of twelve members in the case of *Patton v. U. S.*, 281 U. S. 276, 74 L. ed. 854, 50 S. Ct. 253. The opening paragraph of the opinion in that case shows that the defendant was represented by counsel and that the trial Court had first explained that the defendants need not waive the absence of a juror, and that a mistrial would result in the absence of such waiver. The facts as shown in the report of *Patton v. U. S.*, 30 F. 2d 1015, 1016 shows that the waiver of a juror was initiated by the defendant's counsel. In the instant case the waiver was initiated by the trial Court with no explanation whatever that the defendant need not waive such absence of a juror or of the eventuality of a mistrial if the defendant, who was not represented by counsel, declined to assent to such waiver.[13]

---

13 The complete record of the proceedings concerning the waiver of juror by the petitioner is as follows (R. 95):

"The Clerk. The juror Louis E. Wolcher is absent, your Honor.

The Court. Mr. Wolcher is unavoidably detained and it is now quarter past ten. Mr. Taylor, with your consent, and with the consent of the United States Attorney, may the case be tried by eleven jurors?

Mr. Taylor. Yes, your Honor.

Mr. Hammack. Yes, your Honor.

The Court. It will be so stipulated.

Mr. Hammack. The Government will so stipulate.

The Court. Mr. Wolcher is excused."

It is therefore urged that a waiver of a jury of twelve members under the circumstances of this case is in conflict with the opinion of this Court in the case of *Patton v. United States,* supra, as laid down in the last paragraph thereof, as follows:

> "The consent of government counsel and the sanction of the court must be had in addition to the *expressed and intelligent consent of the defendant.* And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable departures from the mode of a trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity."

7. Certiorari should be granted because of a conflict between circuits.

In the cases of *Frisby v. U. S.* (C. C. A. 4th, 1912) and *U. S. v. Hall* (C. C. A. Pa. 1809), each held that a law which deprives the person accused of a crime of a substantial right in which he was protected and granted immunity by the law in force at the time of the commission of the offense is *ex post facto.*

> *Frisby v. U. S.* (C. C. A. 4th, 1912), 38 App. D. C. 22, 37 L. R. A (N.S.) 96;
>
> *U. S. v. Hall* (C. C. A. Pa. 1809), 2 Wash. 366, 6 Cranch 171, 3 L. ed. 189.

In this case the contract of sale made by the petitioner to Evelyn Flynn was not unlawful on June 6, 1942 when it was executed.

In holding that such contract was a violation of Section 1388.1809, Maximum Rent Regulation No. 28, entitled "Evasion" in order to sustain petitioner's conviction the Court has made an *ex post facto* application of the Regulation in contravention of Article 1, Section 9, Clause 3 of the United States Constitution.

Conclusion.

The writ should be granted.

Dated, San Francisco, California,
July 3, 1944.

Respectfully submitted,

C. M. WALTER of WALTER & BROWN,
JOHN C. STIRRAT,
Counsel for Petitioner.

(Appendix Follows.)

Appendix

PART I.

Statutes Involved.

Section 4(a) of the Emergency Price Control Act of 1942 (Public Law 421, 77th Congress) provides as follows:

> "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 . . ."

Section 205(b) of the Act provides as follows:

> "Any person who *willfully* violates any provision of section 4 of this Act . . . shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment . . . for not more than one year . . . or to both such fine and imprisonment . . ."

Section 205(d) of the Emergency Price Control Act of 1942 provides:

> "No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything *done or omitted to be done in good faith pursuant to any provision of this Act or any regulation,* order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration. . . . In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action

shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action." (Italics added).

Section 205(f)(2) of the Emergency Price Control Act of 1942 provides:

"Whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under this subsection, *or has violated any of the provisions of any regulation, order, or requirement under section 2* or section 202(b), or any of the provisions of any price schedule effective *in accordance with the provisions of section 206, which is applicable to such person, a warning notice shall be sent by registered mail to such person.*" (Italics added.)

Regulations Involved.

The following sections of Maximum Rent Regulation No. 28[1] are pertinent to this case:

"1388.1801(c): The provisions of any lease or other rental agreement shall remain in force pursuant to the terms thereof, except insofar as those provisions are inconsistent with this Maximum Rent Regulation."

"1388.1802. Prohibition Against Higher than Maximum Rents. Regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for use or occupancy on and after the effective date of this Maximum Rent Regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this Maximum Rent Regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this Maximum Rent Regulation may be demanded or received."

---

[1] Fed. Reg. 4916.

"1388.1804. Maximum Rents. Maximum rents (unless and until changed by the Administrator as provided in Section 1388.1805) shall be:

(a) For housing accommodations rented on March 1, 1942, the rent for such accommodations on that date.

(b) For housing accommodations not rented on March 1, 1942, but rented at any time during the two months ending on that date, the last rent for such accommodations during that two-month period.

(c) For housing accommodations not rented on March 1, 1942, nor during the two months ending on that date, but rented prior to the effective date of this Maximum Rent Regulation, the first rent for such accommodations after March 1, 1942. The Administrator may order a decrease in the maximum rent as provided in Section 1388.1805(c).

(d) For (1) newly constructed housing accommodations without priority rating first rented after March 1, 1942 and before the effective date of this Maximum Rent Regulation or (2) housing accommodations changed between those dates so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations changed between those dates from unfurnished to fully furnished or from fully furnished to unfurnished, or (4) housing accommodations substantially changed between those dates by a major capital improvement as distinguished from ordinary repair, replacement and maintenance, the first rent for such accommodations after such construction or change;

Provided, however, That, where such first rent was fixed by a lease which was in force at the time of a major capital improvement, the maximum rent shall be the first rent after termination of such lease. The Administrator may order

a decrease in the maximum rent as provided in Section 1388.1805(c)."

"1388.1805(d). If the rent on the date determining the maximum rent, or any other fact necessary to the determination of the maximum rent, is in dispute between the landlord and the tenant, or is in doubt, or is not known, the Administrator on petition of the landlord filed within 30 days after the effective date of this Maximum Rent Regulation, or at any time on his own initiative, may enter an order fixing the maximum rent by determining such fact; or if the Administrator is unable to ascertain such fact he shall enter the order on the basis of the rent which he finds was generally prevailing in the Defense-Rental Area for comparable housing accommodations on March 1, 1942."

"1388.1814. Effective Date of the Regulation: This Maximum Rent Regulation (1388.1801 to 1388.1814, inclusive) shall become effective July 1, 1942."

Interpretations of the Administrator of the Office of Price Administration concerning the foregoing provisions of Maximum Rent Regulation No. 28 applicable to this case are as follows:

INTERPRETATION 5(a)(1)—I.

Elements of Major Capital Improvement

A "major capital improvement" consists of a substantial change in the housing accommodations such as would materially increase the rental value in a normal market where free bargaining prevailed unaffected by a shortage in housing accommodations. It must be different from ordinary repair, replacement and maintenance.

A major capital improvement falls into one of three categories:

(1) A structural addition,

(2) A structural betterment,

(3) A complete rehabilitation.

(1) Structural Addition

A structural addition is a clear addition to the housing accommodations, such as the construction of an additional room or a new porch or the installation of plumbing, heating or electricity where such facilities did not previously exist. *The addition need not necessarily be a part of the structure,* but might also include a new garage or the installation of sidewalks. *If the improvement has resulted in some added feature which did not exist prior to the change of a kind which would normally result in an increase in the rental value, then it would be a substantial change by a major capital improvement.* (Italics added.)

(2) Structural Betterment

A structural betterment is a qualitative improvement, even though such an improvement is in part a replacement. Within this group would be the modernization of an existing bathroom, the installation of a modern heating plant replacing an antiquated system, a change in the interior partitions such as would improve the layout, and all changes of similar character.

(3) Complete Rehabilitation

A complete rehabilitation is a general modernization and reconstruction such as would make the property attractive in a different rental range. Even though the individual items involved would, if considered separately, be normal repair, replacement and maintenance, if, in the aggregate, there is a substantial change in the character of the housing accommodations, there would be grounds for adjustment. The difference between a rehabilitation which is a major capital improvement and ordinary repairs is primarily a question of degree and extent. Only where the rehabilitation is so comprehensive that it could be expected to result in a comparatively high percentage adjustment in rental would it constitute a major capital improvement.

INTERPRETATION 4(D)—1. PROCEDURE WHERE THERE IS DOUBT AS TO WHETHER A MAJOR CAPITAL IMPROVEMENT HAS OCCURRED.

(Formerly No. 9—Issued July 6, 1942)

The Housing Regulation provides, in Section 4(d), that where housing accommodations have been substantially changed after the maximum rent date and before the effective date of the Regulation "by a major capital improvement as distinguished from ordinary repair, replacement and maintenance," the maximum rent is the first rent after such change. Where the question whether there has been a major capital improvement is a close one, the landlord may not wish to take the risks involved in making his own determination of the question. In such a situation there is, within the meaning of Section 5(d), doubt concerning a "fact necessary to the determination of the maximum rent." The Rent Director on his own initiative may determine this fact for purposes of establishing the maximum rent.

The following provisions from Subpart D (Interpretations) of Procedural Regulation No. 3 issued by the Administrator of the Office of Price Administration are also applicable to Maximum Rent Regulation No. 28 and to the facts of this case:

> "1300.241 Interpretations. . . . Action taken in reliance upon and in conformity with an official interpretation and prior to any revocation or modification thereof or to any superseding thereof by regulation, order or amendment, shall constitute action in good faith pursuant to the provision of the act, or of the regulation or order to which such official interpretation relates. An official interpretation shall be applicable only with respect to the particular person to whom, and to the particular factual situation with respect to which, it is given unless issued as an interpretation of general applicability."

"1300.243 Interpretation to be written: Authorized Officials. Official interpretations shall be given only in writing, signed by one of the following officers of the Office of Price Administration: the Administrator, the general counsel, any associate or assistant general counsel, any regional attorney, any regional rent attorney, any chief attorney for a state or district or defense-rental area office, and any district rent attorney: Provided, that interpretations of general applicability shall be given only by the Administrator, the general counsel, or any associate or assistant general counsel."

PART II.

Excerpts From Defendant's Exhibit 2-B.

Commencing at the top of page 24 and continuing through line 18, page 27 of Defendant's Exhibit 2-B, the testimony given by petitioner at a hearing on November 3, 1942, before the Office of Price Administration, is as follows:

Mr. Dunlap. Q. Mr. Taylor, will you tell us what is contained in Sheet No. 1?[2]

A. Sheet No. 1 is a summary taken from the books, showing the rents on the apartments in the house at 530 Larkin Street on January 1, on February 1, March 1, April 1, May 1, June 1, July 1, August 1, September 1, October 1, and November 1.

It also contains a column following the rent on November 1, in which is said figure designated "Fair rent established by tenants' survey in May and June."

The next column has designations "M U C I R," denoting changes made. "M" denotes major capital improvement; "U" denotes the change from furnished to unfurnished; "C" represents complete rehabilitation; "I" denotes increased services; "R" means refurnished by Mrs. Flynn or additional furnishings provided by Evelyn Flynn.

In the last column is a heading, November 1, total all charges, and in this column are contained the figures which represent the consolidated total billed in accordance with our regular terms of tenancy.

Q. Do all of these charges, rent charges, represent the rent actually charged to tenants?

A. To the best of my knowledge, and taken from the books, they do represent the rents actually charged the tenants.

---

2 Sheet No. 1 here referred to was introduced at trial of petitioner a Govt's. Ex. No. 1.

Q. In the column headed "Changes Made," the letter "M" appears for all of the rooms. May I understand the significance of "Major Capital Improvements"? Will you describe the major capital improvements?

A. Yes. That represents the installation of laundry equipment which was provided for the use of all the apartments in the building. It necessitated structural changes, and the installation of sewer, hot and cold water, and electric lights, and the installation of an automatic laundry machine and the providing of space in which to install it, and the providing of the space for chairs and lights to light the area where it was installed, all of which was structural changes and additions to the property, and as such are distinguished from ordinary maintenance and repair.

Q. What was the total cost of these changes?

A. Total cost would be my own service and that of my employees, which exceeded $500.00.

Q. What portion was for your own services?

A. About ten per cent.

Q. What portion was for material?

A. Including the cost of the machine?

Q. Yes. Including the cost of the machine, the portion for material was about 60 per cent.

Q. The labor of employees?

A. Outside labor was approximately $65.00, but permanant employees, employed in my own machine shop, about $75.00.

Q. Is there any other major capital improvement, Mr. Taylor, besides the one you have mentioned?

A. That is the only one registered on the sheet.

Q. By registered on the sheet——

A. I mean that is the only one in which any reference is made to on that sheet, except complete rehabilitation, which I do not term in that respect yet a major capital improvement.

Q. Is there any other major capital improvement?

A. In the premises?

Q. Yes, since March 1, 1942.

A. Not substantially, except such as is contained in complete rehabilitation of numerous apartments.

Q. When was the laundry machine and the facilities installed?

A. The installation was complete and went into service on the 27th of June, 1942.

Q. When did you first consider making the installation?

A. When I purchased the house, I always considered that it was proper to have laundry equipment in an apartment house.

Q. When did you order the material necessary?

A. About two months prior to June 27.

Q. In the same column, Mr. Taylor, for most of the apartments there is a symbol "U", meaning apparently, changed from furnished to unfurnished.

Mr. Brock. Q. That is unfurnished to furnished, isn't it?

A. No, changed from furnished to unfurnished.

Q. From furnished to unfurnished?

A. Yes.

Mr. Dunlap. Q. Does that refer in all cases to the sale of furniture to Mrs. Flynn?

A. Yes, it does, because after the sale of the furniture to Mrs. Flynn I no longer owned the furniture and could not, therefore, rent the apartments furnished.

Q. Does that symbol "U" represent any other changes?

A. No, that simply refers to the change from furnished to unfurnished.

Q. Will you state the circumstances of the sale of your furniture?

A. Yes. I decided that I did not want to rent the apartments furnished, and I was going to offer the furniture for sale, and in mentioning that to Mrs. Flynn she suggested that if she had the money she would purchase

it. I had previously intended first offering it to the tenants, and if the tenants didn't want to buy it, put it on the open market and get rid of it. But since Mrs. Flynn stated that she would like to go into the business and would rent the furniture to the tenants, I agreed to sell it to her instead.

At the same hearing, the petitioner testified as follows (line 23, page 29 to line 5, page 30 of the same Exhibit):

Mr. Dunlap. Q. Mr. Taylor, the symbol "I", which you stated to mean increased services, price in the column for each apartment——

A. Yes.

Q. Will you state what those increased services represented?

A. In general, the increased services represent the use of the laundry machine and equipment in distinction to its installation, and the use of the sewing machine and other facilities and services now provided, which were not provided previously, or previous to that time.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute and regulation involved	2
Questions presented	2
Statement	3
Argument	9
Conclusion	18
Appendix	20

CITATIONS

Cases:

Adams v. *United States ex rel. McCann*, 317 U. S. 269	12
Avant v. *Bowles*, 139 F. (2d) 702	11
Bailly v. *Loock*, 103 Cal. App. 220, 284 Pac. 235	16
Beaudry v. *Peterson*, 50 Cal. App. (2d) 478, 123 P. 2d 108, 124 P. 2d 637	16
Bowles v. *Willingham*, 321 U. S. 503	11
Gale Realty Corporation v. *Bowles*, 139 F. (2d) 496	16
Nash v. *United States*, 229 U. S. 373	14
Peronnet v. *Ralph*, 112 Cal. App. 97, 296 Pac. 329	16
Taylor v. *Brown*, 137 F. 2d 654, certiorari denied 320 U. S. 787	9, 10, 12
United States v. *Charney*, 50 F. Supp. 581	18
United States v. *Cohen Grocery Co.*, 255 U. S. 81	15
United States v. *Ganz*, 48 F. Supp. 323	18
Wilson v. *Brown*, 137 F. (2d) 348	11
Yakus v. *United States*, 321 U. S. 414	9, 10, 11

Statute:

Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 56 Stat. 765 (50 U. S. C., Appendix, Supp. III, sec. 901 et seq.):

Sec. 2	20
4	21
204	11, 21
205	8, 13, 14, 18, 22
302	16

604367—44——1

Miscellaneous:

Maximum Rent Regulation No. 28 (7 F. R. 4913):

	Page
§ 1388.1801	23
1388.1802	23
1388.1804	24
1388.1805	7, 18, 24
1388.1809	17, 25
1388.1813	16

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 229

STANLEY TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was filed by the District Court. The opinion of the Circuit Court of Appeals for the Ninth Circuit is not yet officially reported, but is set forth at pages 225 to 249 of the Record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 26, 1944 (R. 250). A petition for rehearing was denied on June 2, 1944 (R. 251). A motion to dismiss the proceeding for lack of jurisdiction was denied on June 12, 1944 (Supplemental R. 43). The petition for a writ of certiorari was filed in this Court on July 5, 1944. Jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATUTE AND REGULATION INVOLVED

The case involves the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C., Appendix, Supp. II, sec. 901 et seq.) and Maximum Rent Regulation No. 28 (7 Fed. Reg. 4913), issued pursuant to the Act. The pertinent sections of the Act and of the Regulation are set forth in the Appendix, *infra,* pp. 20–25.

QUESTIONS PRESENTED

1. Whether petitioner's conviction should be set aside because of his contention that he was deprived of an opportunity to defend upon the ground that Maximum Rent Regulation No. 28 was invalid upon its face, or because of his contention that the trial court lacked jurisdiction to proceed while his challenge in a separate proceeding to the validity of the Regulation was still pending.

2. Whether petitioner, who represented himself at the trial, validly consented to the completion of the trial before a jury of eleven members.

3. Whether Maximum Rent Regulation No. 28 is sufficiently clear and specific to satisfy the requirements of due process of law.

4. Whether the trial court erred in not holding that petitioner's apartments had been changed by a major capital improvement, in instructing

the jury that the apartments were not changed from furnished to unfurnished by an agreement for the sale of the furnishings, and in holding that Section 205 (f) (2) of the Act and Section 1388.1805 (d) of the Regulation did not apply.

STATEMENT

The information against the petitioner in the District Court contained 21 counts. The first 20 counts (R. 2–40) charged the petitioner with violating Sections 4 (a) and 205 (b) of the Emergency Price Control Act in October and November 1942, by willfully demanding and receiving higher rentals for specific apartments in a building owned by him in San Francisco than were permitted by Maximum Rent Regulation No. 28, applicable to the San Francisco Bay Defense Rental Area. The 21st count (R. 40–41) charged the petitioner with having violated the same sections and Section 4 (b) of the Act by attempting to evict a tenant in violation of the Regulation. The petitioner was acquitted on the 21st count (R. 208). Three of the remaining counts were dismissed on motion of the United States Attorney (R. 84), and petitioner was convicted on 17 counts (R. 207). He was sentenced to imprisonment for a term of 6 months on each count, the sentences being made to run concurrently, and to pay fines aggregating $950 (R. 209–210). The Circuit Court of Appeals affirmed the judgment.

Subject to exceptions not here material, the Regulation fixed the maximum rent that might lawfully be demanded or received for any housing accommodations within the Defense Rental Area at the rent charged on March 1, 1942, unless between March 1, 1942 and July 1, 1942, the effective date of the Regulation, the housing accommodations were changed from fully furnished to unfurnished, or from unfurnished to fully furnished, or were changed by a major capital improvement as distinguished from ordinary repair, in which event the maximum rent was fixed at the first rent charged after the change.

Petitioner does not dispute that the tenants of the respective apartments were charged the sums stated in the information for the use and occupancy of the apartments, including the furniture and furnishings, during the periods alleged, or that these sums were in excess of the rentals for the same facilities on March 1, 1942. He contended, however, and now maintains he believed in good faith, (a) that a major capital improvement had been made in the apartments between March 1, 1942, and July 1, 1942, and (b) that the apartments had been changed from fully furnished to unfurnished by virtue of an agreement for the sale of the furnishings which petitioner and his wife made on June 6, 1942, with Mrs. Evelyn Flynn, the manager of the apartment The rents which were charged in the transactions

alleged in the information are not shown to have exceeded the first rents charged after the alleged changes had taken place.

The alleged capital improvements consisted of the addition of a washing machine for the use of occupants of 48 apartments in the same building, at a cost of $300 and expenses of installation (R. 94, 177), and the claimed renovation of eight of the 20 apartments covered by the counts of the information relating to rentals. Testimony concerning the extent and dates of renovative work conflicted, the tenants of four of the eight apartments stating that none had been done[1] (R. 46, 47, 59–60, 76–77, 78, 98, 149, 150, 179). The trial court left it to the jury to determine whether any of the apartments had been changed by major capital improvements between March 1 and July 1, 1942 (R. 190).

Under the terms of the agreement relating to the sale of the furnishings[2] (R. 86–93) petitioner and his wife purported to sell them in place to Mrs. Flynn, "subject to the payment of the full purchase price" of $15,000, only $1.00 of which was paid upon the execution of the contract (R. 87). It was agreed that the balance of the purchase price should be payable only out of charges

[1] The tenant of one apartment testified that that apartment had been completely renovated three or four months before the trial which began on January 6, 1943 (R. 59–60).

[2] The agreement consisted of a contract of sale dated June 6, 1942, and a supplementary agreement dated July 31, 1942.

collected from the tenants for the use of the furnishings, and "that all such charges * * * shall be turned over to the sellers as collected until the purchase price has been paid in full" (R. 88). The contract further provided that the furnishings should not be moved from the building in which the apartments were located until all of the purchase price was paid; that the purchaser should "so utilize and use and maintain said furniture and furnishings, as to promote and secure the rental of the apartments" (R. 87); that the contract should "not be transferable or assignable by the purchaser unless the written consent of the sellers is first obtained" (R. 89); that if it should appear to the sellers "that their interests are not properly protected or served" and the purchaser then fail to pay the unpaid balance of the purchase price within 90 days after notice, the sellers should have "the right to cancel this agreement and to recover full possession" of the furnishings; and that upon full payment of the purchase price the sellers should "deliver to said Evelyn Flynn a good and clear title to all of said furnishings and furniture" (R. 92).

Following this transaction, the tenants paid rentals consisting of separate charges for the apartments and for the furnishings, the totals of which were greater than the rentals on March 1, 1942 (R. 93–98, 179–180). It is not disputed that none of the furniture or furnishings was removed from the apartments.

The trial court instructed the jury that it was immaterial whether or not there was a bona fide sale of the furnishings, so far as concerned the defendant's right to charge rentals in excess of those charged for the same accommodations on March 1, 1942, and that, if the apartments as rented remained fully furnished, the maximum rentals fixed by Maximum Rent Regulation No. 28 were those charged on March 1, 1942 (R. 190).

At the trial the petitioner contended that Section 1388.1805 (d) of Maximum Rent Regulation No. 28 (Appendix, *infra,* p. 24) was applicable and that it was error for the court to refuse so to instruct the jury (R. 195–197). This section provides that if the rent on the date determining the maximum rent or any other fact necessary to the determination of the maximum rent is in dispute between the landlord and the tenant, or is in doubt, the Administrator on petition of the landlord within 30 days of the effective date of the Regulation, or on his own initiative, may enter an order fixing the maximum rent. Evidence introduced by the petitioner includes correspondence between him and the Office of Price Administration in San Francisco, which he apparently construed as a request for a ruling with regard to the effect of the transaction with Mrs. Flynn relating to the furnishings (R. 103–115). Included in this correspondence is a letter, signed by the Senior Rent Attorney in that office, replying to one from

the petitioner dated August 8, 1942, in which it is stated that "under the circumstances outlined above, the March 1, 1942 rent would be the maximum rent for the apartment, including the furniture. Your statement that the furniture was sold to Mrs. Flynn prior to July 1, 1942, would not affect this situation" (R. 108–109). The petitioner testified that he remembered this letter (R. 179).

The petitioner further contended (R. 195–198) that Section 205 (f) (2) of the Emergency Price Control Act (Appendix, *infra*, p. 23) applied to this case. That section provides that a warning notice shall be sent to an alleged violator of the provisions of a license issued under "this subsection" of the Act, before revocation proceedings may be instituted.

A jury of 12 was impaneled to try the case. On the morning of the third day of the trial, a roll call showed that one juror was absent. It developed that he was unavoidably detained and, at quarter past ten, the court inquired as follows (R. 95):

> Mr. Taylor, with your consent, and with the consent of the United States Attorney, may the cause be tried by eleven jurors?

Both the petitioner and the United States Attorney replied in the affirmative. The trial thereupon proceeded to a verdict before a jury of eleven members. The petitioner represented himself throughout the trial (R. 43, 181, 208).

At the time of the trial a suit filed by the petitioner in the Emergency Court of Appeals pursuant to Section 204 (a) of the Act, to procure a review of the action of the Price Administrator on September 28, 1942 in denying a protest which he had filed, challenging the validity of the Emergency Price Control Act and of Maximum Rent Regulation No. 28, was still pending (R. 121–122). Before the appeal in the present case was heard by the Circuit Court of Appeals, the Emergency Court of Appeals sustained the Administrator's denial of petitioner's protest (*Taylor* v. *Brown*, 137 F. (2d) 654), and this Court denied a petition for certiorari to review the decision of the Emergency Court of Appeals (320 U. S. 787).

ARGUMENT

I

This case does not present either the question of whether "one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face" or the question of whether "one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure may thus be deprived of the defense that the regulation is invalid", which were reserved in *Yakus* v. *United States*, 321 U. S. 414, 446–447.

Maximum Rent Regulation No. 28 obviously

could not be challenged as invalid upon its face in the sense intended by this Court in the *Yakus* case. Petitioner's own attack upon it, in *Taylor* v. *Brown, supra,* was based upon its allegedly unconstitutional effects. This case, therefore, does not present the first question which petitioner seeks to raise. The validity of the Regulation has in any event now been determined.

At the trial, in the course of a lengthy recital of his previous dealings with the Office of Price Administration, petitioner introduced in evidence a copy of his complaint in the Emergency Court of Appeals, seeking to review the Administrator's denial of his protest directed to the validity of the Regulation (R. 123–147). He raised the question of the trial court's alleged lack of jurisdiction to proceed with the present case while the proceeding in the Emergency Court of Appeals was pending, by a motion to the Circuit Court of Appeals to dismiss the present proceeding and discharge the defendant, filed June 12, 1944, and denied on the same day (Supplemental R. 43). The Circuit Court of Appeals had rendered its opinion in this case on April 26, 1944 (R. 224), after the decision of the Emergency Court of Appeals sustaining the denial of petitioner's protest, which was rendered July 15, 1943. 137 F. (2d) 654. Petitioner's motion was grounded partly upon Section 204 (d) of the Emergency Price Control Act (Appendix, *infra*, p. 21). He makes the same contention here (Pet. 12).

Section 204 (d) of the Act is obviously intended to deprive any court, other than the Emergency Court of Appeals, of authority to entertain objections to the validity of a regulation of the Administrator, not of authority to enforce such a regulation. The trial court was required to assume the validity of the regulation, as it did; and the constitutionality of this requirement has been sustained by this Court in the *Yakus* case. The most that can be said on the basis of the procedural point which was reserved in the *Yakus* opinion is that, at the trial, a continuance might have been justified in order to await a final decision by the Emergency Court of Appeals with respect to the validity of the Regulation, although this is by no means a necessary inference. Petitioner is not entitled to have his conviction set aside for reasons which have lost all force. As matters have developed, he has suffered no harm as a result of the sequence of events but has had his full day in court upon his challenge to the validity of the Regulation. He will suffer punishment, if his conviction stands, only as a result of a proper trial for violation of a regulation which has been found to be valid in all respects in a proceeding which he himself brought.[3] It would

[3] Regulations identical with the instant regulation (except as to the effective date and the base rent date) were also sustained by the Emergency Court of Appeals in *Wilson* v. *Brown*, 137 F. (2d) 348, and *Avant* v. *Bowles*, 139 F. (2d) 702. The regulation involved in the *Avant* case was also before this Court in *Bowles* v. *Willingham*, 321 U. S. 503.

now be an idle gesture to remand the case to the District Court to permit the petitioner to offer a defense which is foreclosed by the decision in *Taylor* v. *Brown, supra.*

II

Petitioner gave valid consent to the completion of the trial before a jury of 11 members and was not deprived of his constitutional right to jury trial. He now claims that, as a layman representing himself, he should have been specifically informed that a refusal on his part to consent would result in a mistrial. He was, however, asked whether the cause "may be tried by eleven jurors." No other inference was possible than that a refusal to consent would halt the trial. As the record reflects throughout, petitioner was an aggressive defender of his own interest at the trial. He had elected to represent himself after his counsel withdrew (R. 208) and was treated with especial consideration on that account (R. 181). He was not under any disability or handicap but was, rather, the "shrewd and experienced" layman whom this Court has recently held to be competent to waive trial by jury altogether in a prosecution for serious crime. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 278. In the circumstances of the present case there were both "the exercise of a free and intelligent choice" and

"the considered approval of the court," which this Court has held to be essential to a valid waiver (*idem*, p. 275). The trial, moreover, was for an offense involving a maximum punishment of imprisonment for one year or a fine of not more than $5,000, or both (Section 205 (b) of the Emergency Price Control Act, Appendix, *infra*, p. 22), and not for a felony. As the court below concluded (R. 244), "although the right of an accused to a trial by a constitutional jury must be jealously safeguarded by the court throughout," the defendant "intelligently and freely consented to the trial's continuing to termination by less than 12 jurors" and there was "no error in failure of the trial judge to inform the defendant of the eventuality of a mistrial unless he elected to proceed with the trial by the 11 jurors."

III

The other reasons urged by petitioner for granting certiorari are plainly without merit. In substance, they are (1) that the Regulation is so vague as to violate the requirements of due process and (2) that the court erred in not holding that the apartments had been changed by a major capital improvement between March 1, 1942 and July 1, 1942; in instructing the jury as a matter of law that the agreement for the sale of the furnishings did not have the effect of changing the apartments from furnished to unfurnished; and in

holding that Section 205 (f) (2) of the Act and Section 1388.1805 (d) of the Regulation were without application to the case.

Petitioner's assertion that the Regulation is so vague and uncertain as to violate the requirements of due process is an attack upon its validity which can only be made by following the procedure prescribed by Sections 203 and 204 of the Act. It is clear in any event that there is no merit in the contention. Petitioner points out that under the Regulation the maximum rent which might be charged for housing accommodations depended in certain circumstances on whether they had been changed by a major capital improvement between March 1, 1942, and July 1, 1942, and that minds may differ as to what constitutes a major capital improvement in close cases. Therefore, he maintains, one subject to the Regulation was made to speculate at the peril of possible imprisonment regarding the rent he might lawfully charge. But, as Mr. Justice Holmes said in *Nash* v. *United States*, 229 U. S. 373, 377, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or short imprisonment, as here; he may incur the penalty of death."

Moreover, Section 205 (b) of the Act (Appendix, *infra*, p. 22), as the trial court carefully

instructed the jury (R. 187–188), prescribes criminal sanctions only for willful violations. If a landlord subject to Maximum Rent Regulation No. 28 reasonably and in good faith believed that housing accommodations which he owned had been changed by a major capital improvement between March 1, 1942, and July 1, 1942, he could not be convicted because of having charged rents not exceeding the first rents charged after the change in the accommodations. On no construction, therefore, could the provisions of the Regulation become a trap for those who acted in good faith. The principle enunciated in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, and the other cases relied upon by petitioner, therefore, has no application to this case. The verdict of the jury settles the question of the petitioner's knowledge that he was violating the Regulation.

The jury decided adversely to the petitioner with regard to his contention that a major capital improvement had been made, and its verdict is amply supported by the evidence. The installation of a washing machine for the use of tenants of 48 apartments, at relatively slight expense, while conceivably a capital improvement, was obviously not a *major* capital improvement; and the renovation of a few apartments in a large building, even if it took place, falls clearly in the category of maintenance and repair rather than in that of

604367—44——3

major capital improvements. *Gale Realty Corporation* v. *Bowles,* 139 F. (2d) 496 (Em. Ct. App.).

Petitioner's claim that the apartments had been changed prior to July 1, 1942, from fully furnished to unfurnished by virtue of the agreement with Mrs. Evelyn Flynn, manager of the apartments, and that the court erred in instructing the jury to the contrary is likewise not sustainable.

Under the laws of California the contract, particularly in view of its provisions for the transfer of title upon payment of the purchase price and for the cancellation of the contract and the retaking of possession by the sellers in case they should decide that their interests were not being properly protected, was merely an executory contract to sell and did not have the effect of transferring ownership of the furniture to the purchaser. *Beaudry* v. *Peterson,* 50 Cal. App. (2d) 478, 123 P. 2d 108, 124 P. 2d 637; *Peronnet* v. *Ralph,* 112 Cal. App. 97, 296 Pac. 329; *Bailly* v. *Loock,* 103 Cal. App. 220, 284 Pac. 235.

Even if the contract had the effect of transferring ownership of the furnishings, the result would still be the same. The Act (Sec. 302 (f) and (g)) and the Regulation (Sec. 1388.1813 (6) and (10)) define the term "housing accommodations" as "any building, structure, or part thereof, or land appurtenant thereto, or any other real

or personal property rented or offered for rent for living or dwelling purposes * * * together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property" and the term "rent" as "the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations." Despite the change of ownership of the furnishings, if a change of ownership had been effected, the furniture was "connected with the use or occupancy" of the apartments and under the Regulation was a part of the housing accommodations. The tenants after the alleged change of ownership as before were renting furnished apartments and the amounts paid for the apartments and the furnishings constituted rent for housing accommodations which could not validly be increased above the sums charged on March 1, 1942. As the court below states (R. 233), the agreement was in the nature of a device to circumvent the Regulation. It appears to have been a violation of Section 1388.1809 of the Regulation (Appendix, *infra*, p. 25), although not separately charged as such.

Whether the agreement had the effect of changing the apartments from furnished to unfurnished was a question of law. The court, therefore, did not usurp the functions of the jury in instructing that the agreement did not have the effect which petitioner claimed it had.

It is evident from a mere reading of Section 205 (f) (2) of the Act (Appendix, *infra,* p. 23) and Section 1388.1805 (d) of the Regulation (Appendix, *infra,* p. 24) that these sections have no application to the facts of this case. The former deals solely with the procedure for revocation of licenses to sell commodities. *United States* v. *Charney,* 50 F. Supp. 581 (D. C. Mass.); *United States* v. *Ganz,* 48 F. Supp. 323 (D. C. Mass.). The latter provides for the administrative determination of the amount of rent on the date determining a maximum rent, or "any other fact" upon which a maximum rent depends, if either is in dispute or is doubtful or not known, upon the Administrator's own initiative or "on petition of the landlord filed within 30 days after the effective date" of the Regulation. Petitioner filed no such petition and the letter which he did write at a later time was answered (*supra,* p. 7). The question which he raised, moreover, was not a question of fact coming within the quoted paragraph of the Regulation.

CONCLUSION

The decision of the court below is clearly right, is not in conflict with any decision of this Court or of any other Circuit Court of Appeals, and does not involve any important question of Fed-

eral law which has not been, but should be, determined by this Court. We respectfully submit, therefore, that the petition should be denied.

CHARLES FAHY,
Solicitor General.

THOMAS I. EMERSON,
Deputy Administrator,
FLEMING JAMES, JR.,
DAVID LONDON,
Office of Price Administration.

AUGUST 1944.

APPENDIX

STATUTE

The pertinent provisions of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 56 Stat. 765 (50 U. S. C., Appendix, Supp. III, sec. 901 et seq.), are as follows:

SEC. 2. * * *

(b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or

comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. * * *

* * * * *

(g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

* * * * *

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, * * *.

* * * * *

SEC. 204. * * *

(d) * * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any

regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

SEC. 205. * * *

(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

* * * * *

(f) (1) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of any regulation or order issued or which may be issued under section 2, or of any price schedule effective in accordance with the provisions of section 206, he may by

regulation or order issue to or require of any person or persons subject to any regulation or order issued under section 2, or subject to any such price schedule, a license as a condition of selling any commodity or commodities with respect to which such regulation, order, or price schedule is applicable. * * *

(2) Whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under this subsection, or has violated any of the provisions of any regulation, order, or requirement under section 2 or section 202 (b), or any of the provisions of any price schedule effective in accordance with the provisions of section 206, which is applicable to such person, a warning notice shall be sent by registered mail to such person. * * * [Further violation may then result in revocation proceedings in court.]

REGULATION

The pertinent provisions of Maximum Rent Regulation No. 28 (7 F. R. 4913) are as follows:

§ 1388.1801 *Scope of regulation.* (a) This Maximum Rent Regulation applies to all housing accommodations within each of the following Defense Rental Areas * * *

(1) The San Francisco Bay Defense-Rental Area, * * *.

§ 1388.1802 *Prohibition against higher than maximum rents.* Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for use or occupancy on and after the effective date of this Maximum Rent Regulation of any housing accommodations within the Defense-Rental Area higher than the maxi-

mum rents provided by this Maximum Rent Regulation; * * *.

§ 1388.1804 *Maximum rents.* Maximum rents (unless and until changed by the Administrator as provided in § 1388.1805) shall be:

(a) For housing accommodations rented on March 1, 1942, the rent for such accommodations on that date.

* * * * *

(d) For (1) newly constructed housing accommodations without priority rating first rented after March 1, 1942, and before the effective date of this Maximum Rent Regulation, or (2) housing accommodations changed between those dates so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations changed between those dates from unfurnished to fully furnished, or from fully furnished to unfurnished, or (4) housing accommodations substantially changed between those dates by a major capital improvement as distinguished from ordinary repair, replacement and maintenance, the first rent for such accommodations after such construction or change * * *

* * * * *

§ 1388.1805 *Adjustments and other determinations.* * * *

* * * * *

(d) If the rent on the date determining the maximum rent, or any other fact necessary to the determination of the maximum rent, is in dispute between the landlord and the tenant, or is in doubt, or is not known, the Administrator on petition of the landlord filed within 30 days after the effective date of this Maximum Rent Regulation, or

at any time on his own initiative, may enter an order fixing the maximum rent by determining such fact; or if the Administrator is unable to ascertain such fact he shall enter the order on the basis of the rent which he finds was generally prevailing in the Defense-Rental Area for comparable housing accommodations on March 1, 1942.

* * * * *

§ 1388.1809 *Evasion.* The maximum rents and other requirements provided in this Maximum Rent Regulation shall not be evaded, either directly or indirectly, in connection with the renting or leasing or the transfer of a lease of housing accommodations, by way of absolute or conditional sale, sale with purchase money or other form of mortgage, or sale with option to repurchase, or by modification of the practices relating to payment of commissions or other charges, or by modification of the services furnished with housing accommodations, or otherwise.

U. S. GOVERNMENT PRINTING OFFICE: 1942

SEP 12 1944
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 229

STANLEY TAYLOR, *Petitioner,*

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

C. M. WALTER of WALTER & BROWN,
JOHN C. STIBRAT,
Counsel for Petitioner.

PHELAN-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Page

Preliminary Statement 1

I.

Reply to points raised in opposition 6

Conclusion 30

Table of Authorities Cited

Cases

Adams v. U. S., ex rel. McCann, 317 U. S. 269 ..... 19, 20

Bowles v. Willingham, 64 S. Ct. 641 ..... 14, 15

Flynn v. Bowles, No. 87, and certiorari was denied by this court (64 S. Ct. 617), petition for rehearing denied (64 S. Ct. 785) 15n

Henderson v. Taylor, et al., No. 22,364-W, U. S. Dist. Ct., So. Div., No. Dist. Calif. 10, 11

Olmstead v. U. S., 277 U. S. 438 .....

Wilson v. Brown, 137 F. (2d) 348 14

Yakus v. U. S., 64 S. Ct. 660 ..... 6, 14, 17, 22, 30

Statutes

Emergency Price Control Act of 1942:

Section 2 ..... 22n, 2

Section 4(d) 10, 14, 1

Section 203 ..... 7, 17n, 2

Section 204 ..... 21, 2

Section 205 17

Section 205(b) 21, 2

Section 205(d) .....

Section 205(e) 2

Section 205(f)(2) 25, 26, 2

Miscellaneous

Fifth Amendment to the Constitution 1

23 C. J. S. 1190, pp. 734-735 ..... 25, 2

23 C. J. S. 1191 2

23 C. J. S. 1198 2

23 C. J. S. 1334 2

23 C. J. S. 1337 2

Maximum Rent Regulation 28 6,

Procedural Regulation No. 3:

Section 1300.241 2,

Section 1388.1804 (d) .....

Section 1388.1804(d)(4) 3

Section 1388.1805 (c) .....

Section 1388.1805(d) 3, 25,

Section 1388.1806(a)(6) .....

Section 1388.1806(b)(2) 1

Section 1388.1809 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 229

STANLEY TAYLOR, *Petitioner,*

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

PRELIMINARY STATEMENT.

It is apparent on reading the Brief For The United States In Opposition, that counsel for the government, who are now entering into this case for the first time, have entirely misunderstood some of the basic facts of the case and have misconceived the theory upon which petitioner bases his defense in vital respects.

It is incumbent upon us, therefore, to reply to the brief for the government and cover rather thoroughly the points misunderstood even though that involves in some instances a discussion of the merits of the case which might properly be reserved until this Court acts upon the Petition.

Before proceeding to reply to the contentions of the government, it is appropriate to point out here what the government has omitted in its brief.

We stated in the Petition, under Reasons Relied On for Granting The Writ (p. 13(a)):

> "(a) The capital improvements made by petitioner are admitted, and *that they comply with the Official Interpretation 5(a)1-I defining Major Capital Improvements has not been denied.*"

On page 16 under (c) we again stated:

> "The improvement made fits with exactitude every test of Official Interpretation 5(a)1-I promulgated by the Office of Price Administration for the determination of this question."

and

> "The lower Court held that §1388.1805(d) of the Regulation has no relevancy to this case. (R. 239.) *This is entirely opposed and contrary to Official OPA Interpretation 4(d)-I* entitled 'Procedure Where There Is Doubt As To Whether A Major Capital Improvement Has Occurred,' which provides . . . etc. . . . " (See pp. 17-18 for full text.)

We set forth these Official Interpretations in the Appendix to the Petition in Part I, pp. IV-VI, thereof.

We set forth in said Appendix (on page VI), Section 1300.241 of Procedural Regulation No. 3 which provides:

> "Action taken in reliance upon and in conformity with an official interpretation and prior to any revocation or modification thereof or to any superseding thereof by regulation, order or amendment, shall constitute action in good faith pursuant to the provision

of the act, or of the regulation or order to which such official interpretation relates."

By this provision of the procedural regulation, *supra,* the Official Interpretations here under consideration have been given the force and effect of law in that by fixing his rents in accordance with Section 1388.1804(d)(4) of the Regulation as the first rent after the Major Capital Improvement *as defined by the Interpretation,* petitioner falls within the protection of Section 205(d) of the Act, which provides:

"(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial Court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement or agreement thereunder . . . "

Thus, regardless of all other issues in the case, and there are many, these two Official Interpretations establish that the verdict was contrary to the law, and that it was reversible error for the trial Court to refuse to give the Instruction requested concerning Section 1388.1805(d) of the Regulation, which is referred to in Official Interpretation 4(d)-I, *supra.*

Notwithstanding this fact and the strong assertions hereinbefore made and previously asserted in the lower Court (Supp. Tr. 26-32) we find no denial in the Brief for the United States In Opposition. There is no reference to either of these Interpretations in the entire brief, nor is any other Interpretation set forth in opposition;

in fact, the word "interpretation" does not appear any place in the Brief. This refusal of the government and the Office of Price Administration to recognize these Official Interpretations issued by the Administrator has persisted since November 9, 1942, and has resulted in great losses to petitioner and has deprived him of his property to the extent of many thousands of dollars since that time; his liberty has been in jeopardy since December 11, 1942.

It is to be noted in this connection that the making of a major capital improvement cannot result in improper or inflationary rents. The administrator has full authority under the regulation to reduce the rents in such cases *at any time* either on his own initiative or on the application of the tenant. (Section 1388.1804 (d) and 1388.1805 (e).)

In the case of *Olmstead v. U. S.*, 277 U. S. 438, the question arose as to whether the accused was denied due process by reason of the fact that the evidence upon which he was convicted was illegally obtained (wiretapping being a misdemeanor under the state law). There was no question concerning the guilt of the accused. The conviction was upheld by a five to four vote. It is the dissenting opinions in this case in which we are now interested.

Mr. Justice Holmes stated:

> "We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part. If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities to succeed."

Mr. Justice Brandeis reinforced the position of Mr. Justice Holmes, stating:

> "Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

In the instant case we have an entirely different situation as regards the guilt of the accused. Petitioner is unquestionably innocent of the offenses charged. Counsel for the government admits on pages 4 and 5 of the brief in opposition that:

> "The rents which were charged in the transactions alleged in the information are not shown to have exceeded the first rents charged after the alleged changes had taken place." (Br. for U. S., pp. 4-5.)

and yet we find both the Office of Price Administration and the government (if there be any difference) seeking to maintain this unlawful and erroneous conviction.

We respectfully submit that this Honorable Court should take jurisdiction hereof by granting certiorari so that the law may be enforced.

We will now take up the questions raised by counsel for the government.

REPLY TO POINTS RAISED IN OPPOSITION.

I.

In the Argument, point I, pp. 9 to 12 and in footnote 3, p. 11 of the Brief for the government in opposition, counsel erroneously states:

(a) That Maximum Rent Regulation 28 obviously cannot be challenged as invalid upon its face in the sense intended by this Court in the *Yakus* case.

(b) That petitioner has had his full day in Court upon his challenge to the validity of the Regulation . . . that the regulation here in question has been found to be valid in all respects (referring to *Taylor v. Brown*) . . . and that Regulations identicall with the instant regulation (except as to dates) were sustained by the Emergency Court of Appeals in the cases cited in footnote 3, p. 11.

These statements or contentions upon which counsel for the government bases the argument in point I of the government's brief are entirely contrary to the facts.

The Regulation here in question, i. e., Maximum Rent Regulation No. 28 *as it was constituted and effective during the times involved in the criminal Information herein* was not considered by the Emergency Court of Appeals in the cases cited, nor so far as is known to petitioner or his counsel has it ever been the subject of judicial review, notwithstanding that petitioner and Evelyn Flynn each have sought adjudication thereof pursuant to pro-

tests duly filed under the provisions of Section 203 of the Emergency Price Control Act of 1942.[1]

The cases cited by the government (footnote 3, p. 11 of Br. for U. S.) and *Taylor v. Brown,* cited by the government were all instituted pursuant to protests filed between August 27, 1942, and August 29, 1942, inclusive[2] pursuant to the requirement of Section 203 of the Act whereby such protests had to be filed within sixty days after the issuance of the protested regulation. Thus the protests and cases cited applied to the Regulation as it was constituted when it was issued on June 30, 1942, or at the latest as it was constituted on August 29, 1942.

Obviously, the constitutional questions peculiar to the instant case, and arising in substantial part because it is

---

[1]Protests filed by petitioner in addition to the original protest, denial of which was the occasion for the filing of the complaint in Taylor v. Brown cited by the government are: Protest (of Stanley W. Taylor) No. 15 Region VIII, denied by the Administrator on August 3, 1943, and now pending before the Emergency Court of Appeals as Taylor v. Bowles No. 81; Protest Docket MR 28-31-P filed August 1, 1944 and still pending before the Administrator. Evelyn Flynn filed a protest seeking adjudication of constitutional questions involving the validity of the Regulation in relation to the same property here involved and relating to the manner in which the Administrator had joined her with the petitioner herein and deprived her of the use and possession of her property thereby. Pursuant to the denial of her protest Evelyn Flynn filed a complaint in the Emergency Court of Appeals where it was docketed as Flynn v. Bowles No. 87, the complaint was dismissed without adjudication and certiorari was denied by this Court. Petition for rehearing was denied by this Court on March 27, 1944. 64 S.Ct. 785.

[2]The Protest in Taylor v. Brown, was filed in San Francisco August 27, 1942; the Protest in Wilson v. Brown, was filed on August 29, 1942; the Protest in Avant v. Bowles was filed on August 28, 1942 and an amended protest was filed on August 29, 1942 (OPA Service, 602:85-86); see record of cases as cited by the government.

a criminal case, were not and could not have been settled by these earlier procedures which were all instituted more than three months before the criminal Information was filed. These constitutional questions are in large part inextricably involved in and related to the validity of the Regulation *as it was constituted during the times involved in the Criminal Information, and as it has been applied to petitioner herein.*

When petitioner filed his protest MR28-19-P on August 27, 1942, pursuant to the denial of which the case of *Taylor v. Brown* was filed, he was not in position to and did not raise the questions peculiar to this case and upon which it is now contended that the Regulation is invalid on its face and invalid as it is applied to petitioner herein. It is a principle of law too well recognized to require further comment here that no person can properly challenge the validity of a statute or rule of law until it has been or is about to be exercised to his disadvantage. On August 27, 1942, and at all times between July 1, 1942, and November 9, 1942, petitioner was operating his property under the rentals established by Section 1388.1804 (d)(4) of the Regulation.[3] No objection was raised by the Administrator to petitioner's operation under 1388.1804

[3](The first rentals following the installation of the laundry equipment on June 27, 1942) Petitioner reported this improvement to the Administrator as a Major Capital Improvement in writing on August 27, 1942 (R. 116-117, see R. 153 bottom—154 and 151, and excerpts from Exhibit 2-B set forth in the Appendix to the Petition herein, Part II, pp. viii-x). As we have heretofore stated, counsel for the government admits in his Statement (Brief for U. S. pp. 4-5) that:

> "The rents which were charged in the transactions alleged in the information are not shown to have exceeded the first rents charged after the alleged changes had taken place."

(d)(4), (the first rent after the major capital improvement) until November 9, 1942, when said Administrator filed an application for a preliminary injunction against petitioner and Evelyn Flynn. (R. 159-160.)[4]

The temporary restraining order which was issued on November 9, 1942, without notice to petitioner, in effect set aside the tenancy agreements under which the apartment house had been operating since before the time the Regulation was issued, prohibited the collection of any compensation for the use of the laundry equipment, or the linens, silver, and additional furniture provided the tenants by Evelyn Flynn (which were not provided on March

---

[4]In an affidavit in support of the application for a preliminary injunction, David C. Dunlap, enforcement attorney for the Administrator stated:

> "On November 2, 1942, Evelyn Flynn advised affiant that the defendants had installed a washing machine in the apartment house for the common use of the tenants. This washing machine, the parties contend, constituted a major capital improvement installed between March 1, and July 1, 1942. *Said machine was undoubtedly an improvement to the apartment house as a whole*, but it did not constitute a major capital improvement as to any unit in the house, and it does not come within the meaning of a major capital improvement under Maximum Rent Regulation No. 28." (Our emphasis.)

The foregoing statement has never been supported by any official ruling of the Office of Price Administration, and in stating that the improvement does not constitute a major capital improvement "as to any unit in the house" or under the Regulation, the above statement is entirely opposed to Official O.P.A. Interpretation 5(a)(1)-I entitled "Elements of Major Capital Improvement" which specifically states:

> "the addition need not necessarily be a part of the structure * * * If the improvement has resulted in some added feature which did not exist prior to the change of a kind which would normally result in an increase in the rental value, *then it would be a substantial change by a major capital improvement.*" (Italics added.)

This Official Interpretation of the Office of Price Administration is set forth in the Appendix to the Petition herein, Part I, pp. iv-v.

1, 1942) and joined Evelyn Flynn as the owner of the furniture, and petitioner (the owner of the real property) in such a way that neither could determine what sums belonged to each, and neither could charge or collect a just compensation or rental for the facilities furnished. (R. 162-163, 46.)

Petitioner promptly appealed to the Administrator to grant him a hearing and determine these matters by administrative process (R. 165) but when he was denied an interview and informed by attorneys for the Administrator that it was a personal matter with them and that he would have many law suits to face (R. 161, 164), petitioner sought to withdraw the property from rental (R. 158, 161-165).

Although petitioner based his right to withdraw the property from rental on Section 4(d) of the Act which provides:

> "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent."

and although petitioner served notices on the Office of Price Administration and on the tenants specifying this Section as his authority in accordance with the requirements of the Regulation as it was originally issued, the Administrator, on the next day, December 5, 1942, made application to the Court in the civil case, to have petitioner adjudged in contempt of Court and fined $500.00 and confined in prison until he would withdraw the aforesaid notices. (R. 156-174 at 159, 160, 162, 167, 169, 170, 173, see also record of civil case *Henderson v. Taylor, et*

al., No. 22,364-W, U. S. Dist. Ct., So. Div., No. Dist. Calif. admitted in evidence R. 159-160.)

Petitioner was fined $500.00 (the fine was subsequently remitted for compliance with the terms of the injunction) and petitioner was compelled to continue renting the property in question.[5]

The foregoing serves to emphasize one of the radical differences between the Maximum Rent Regulation No. 28, as it was issued on June 30, 1942, and Maximum Rent Regulation No. 28 as it was constituted during the times involved herein. Numerous amendments were made by the Administrator after the statutory period for protest had expired, interpretations were issued which were given the force and effect of law by Section 1300.241 of Procedural Regulation No. 3 (Appendix to Petition, Part I, p. vi). These amendments and Interpretations were issued so frequently that responsible officials and attorneys for the Administrator were unable to keep up with them or advise the public as to their text or the requirements thereunder.[6] The substantive provisions of the regulation (in-

[5]Petitioner is still being compelled to rent the property in question and is still deprived of the right to collect just rents for the facilities furnished or any compensation for laundry equipment and other facilities which were not provided on March 1, 1942. These matters are the subject of appeals and protests now pending in the cases of Taylor et al. v. Bowles, C.C.A 9, No. 10,509; Taylor v. Bowles, U.S.E.C.A. (Emergency Court of Appeals) No. , and Protest MR28-31-P pending before the Administrator.

[6]The following letter dated November 19, 1942 from M. R. Benedict, Area Rent Director in the San Francisco Defense-ental Area, illustrates this point as does the excerpt from letter Ruth Delaney, Real Estate and Insurance Broker dated Decem-21, 1942 and referring to an occurrence in the same office of Office of Price Administration about December 11, 1942. llowing these are excerpts from the Congressional Hearing re-ing to this subject. These letters are respectively Exhibits 184 186 from the "Testimony of Stanley W. Taylor, President, merican Property Owners, Inc., San Francisco, Calif." before

cluding Official Interpretations) had been increased from fifteen or twenty pages when issued, to over 100 pages

---

the Special Committee To Investigate Executive Agencies, House of Representatives, Seventy-Eighth Congress, First Session, pursuant to H. Res. 102, A Resolution Establishing a Select Committee to Investigate Acts of Executive Agencies Beyond the Scope of Their Authority. The page references are to the volume entitled HEARINGS (before said committee) Part 1, April 7 (to) June 22, 1943. The letters follow.

EXHIBIT No. 184

OFFICE OF PRICE ADMINISTRATION,
San Francisco, Calif., November 19, 1942.

MISS ANGELA M. WHITE,
1641 Washington Street, San Francisco, California.

DEAR MISS WHITE: This will acknowledge your letter of November 13. For your information I am enclosing a copy of the regulations under which the rent-control program is administered. This is the basic regulation issued about July 1, 1942. There have been since then a good many official interpretations of parts of this and also a few amendments to it. Unfortunately we are not able to supply you with these since we are only now having complete files made up for our own staff. That file is quite voluminous and really only of use to attorneys and examiners. I think, however, this basic regulation will give you most of the information you desire.

Sincerely yours,

M. R. BENEDICT,
Area Rent Director.

(Hearings, Part 1, p. 694 admitted 653 (witness called pp. 646, 652).)

EXHIBIT No. 186

RUTH DELANEY

REAL ESTATE—INSURANCE

SAN FRANCISCO, *December 21, 1942.*

MR. STANLEY TAYLOR,
1201 Fulton Street,
San Francisco, Calif.

* * * * * * *

About the 11th of December I went to one of the attorneys at the O. P. A. to find out how to legally evict a tenant according to the laws set up by the O. P. A. This attorney showed me a list of several reasons for eviction, but added that amendments had been made to this printed list and were in force since the 1st of December but the San Francisco Board had not yet received the changes, but she also stated

eleven months later. (See Rent Regulation For Housing with Official Interpretations, issued June 1, 1943, a 115-

---

that they were supposed to enforce the amended list. (For your information, the lady I spoke to was Mrs. Cox.)

* * * * * * *

Your very truly,

/s/ RUTH DELANEY, *Broker.*

(Hearings, Part 1, p. 695, admitted 655.)

Pursuant to the foregoing letters and the evidence adduced in relation thereto, Congressman Fred A. Hartley (New Jersey), made the following comment:

"MR. HARTLEY. In other words in that particular office, the O.P.A. officials didn't know the amendments and changes that had been made in the regulation, but undoubtedly, if that party had violated them, all hell would have broken loose, is that right?

(MR. TAYLOR. That is right.)" (Hearings, p. 655.)

Pursuant to the introduction of additional official letters of the same office of the Office of Price Administration, relating to Interpretations and specific cases, Congressman John Jennings (Tennessee), made the following query which was answered in the affirmative:

"MR. JENNINGS. In other words, they tell him what he must do to get any relief, and then they interpret that statement by saying that they don't mean what they say?" (Hearings, p. 663.)

And Congressman Hartley commented:

"MR. HARTLEY. Well, now, you have cleared up one thing in my mind, because you have proved to me the difference between a regulation and an interpretation is that an interpretation proves that the regulation doesn't mean what it says; so that that is one thing that has been cleared up."

Pursuant to evidence relating to petitioner's case, here before the Court, the following comments were made:

"MR. JENNINGS. It would seem to me that this predicament is somewhat that of the cooperators under the Lever Act of the First World War who were, wholesale, tried under rules and regulations and the Supreme Court held finally that the act and those rules and regulations were so obscure and indefinite as to be meaningless.

THE CHAIRMAN. That may be true, but we can't sit as an appellate court over the District Court of California.

MR. JENNINGS. Of course we can't. But it is predicated on what the O. P. A. is doing, that a citizen can be tried and convicted on an interpretation of a regulation, that seems to be so obscure that the people who issued the regulation had to issue an interpretation to make it have some meaning." (Hearings, p. 673.)

page volume exclusive of Table of Contents.) A most important amendment among those made on October 19, 1942, was one whereby Section 1388.1806(a)(6) of the Pegulation was amended by omitting therefrom the provision originally included therein which provided, in recognition of Section 4(d) of the Act, that a landlord might evict his tenant if he sought in good faith not to offer the housing accommodations for rent. The Emergency Court of Appeals in the case of *Wilson v. Brown,* 137 F. (2d) 348, cited this provision which was in the original Regulation, but which was removed on October 19, 1942, as emphasizing that there was no "taking" of the property in the constitutional sense. The Court there stated:

> "The landlord is thus free to occupy the property himself, or devote it to some commercial enterprise, or utilize it in any other way."

This Honorable Court cited the Emergency Court case of *Wilson v. Brown, supra,* in its opinion in the case of *Bowles v. Willingham,* 64 S. Ct. 641 at 648, stating:

> "There is no requirement that the apartments in question be used for purposes which bring them under the Act."

In the cases of *Yakus v. U. S.,* 64 S. Ct. 660, and *Rottenberg v. U. S.,* decided together on March 27, 1944, this Court further emphasized this construction of the Act at pages 670 and 673. The Court there stated:

> "The present statute is not open to the objection that petitioners are compelled to serve the public as in the case of a public utility, * * *
>
> * * * For as we have seen, Section 4(d) specifically provides that no one shall be compelled to sell any commodity, * * * " (64 S. Ct. 673.)

and again

> "Petitioners were therefore not required by the Act, nor so far as appears by any other rule of law, to continue selling meat at wholesale if they could not do so without loss." (p. 670.)

Thus, we see that the Act itself and the Regulation, as it was originally issued, was sustained upon this principle, i. e., that there is no constitutional taking of property where there is no requirement that it be sold or rented.

Bowles v. Willingham, 64 S. Ct. 641 at 648.

This principle is violated by the Regulation here under consideration, for it plainly requires that the landlords subject thereto must continue to rent such property and does not provide for just compensation therefor. As seen in this case a landlord may be compelled to provide valuable services and equipment which he has never before provided and be deprived of any compensation therefor, for it is plain that many improvements, rehabilitation, or furnishings, may not be removed from the tenant once the tenant has obtained possession thereof or the improvements have been made to the premises.[7]

In this respect then the Regulation is invalid on its face and has been so at all times since October 19, 1942, for

---

[7]Evelyn Flynn was denied possession of her furnishings by the Administrator, The Emergency Court refused to entertain the case in *Flynn v. Bowles*, No. 87, and certiorari was denied by this Court (64 S. Ct. 617), petition for rehearing denied. (64 S. Ct. 785.)

it is plainly in contravention of both the Fifth Amendment to the Constitution and Section 4(d) of the Act.[8]

The Criminal Information herein was filed December 11, 1942, after the restraints were placed upon petitioner requiring him to continue renting his property, and before the issues raised by the Restraining Order were settled or determined. The Criminal Information charges criminal collections of rent after October 19, 1942, and covering rental periods after October 19, 1942. (R. 4-40.)

The manner in which it is contended that the regulation is invalid as applied to petitioner in relation to the alleged offenses charged in the Information is set forth in part in the Supplemental Transcript of Record herein on pages 26 to 34. While some of the provisions, which in application against petitioner in the instant case have proven to be invalid (Supp. Tr. 26-34), were in the original Regulation, they were obviously not considered by the

---

[8]Other grounds upon which the Regulation was invalid on its face at the times involved herein was the requirement in Section 1388.1806(b)(2) issued October 19, 1942 creating unlawful obstacles to the sale of real property by providing that a purchaser after October 20, 1942 could not obtain possession thereof by the eviction of the tenant *unless he had paid 33⅓ per cent or more of the purchase price excluding any payments made from funds borrowed for the purpose of making such principal payment* and providing further that the purchaser before he takes action to evict must petition the Administrator, obtain a Certificate from the Administrator (if that be possible) *and* THEN *wait three months after the issuance of the certificate before he proceeds under the requirements of the local law to recover possession of the property.*

The foregoing provisions are plainly beyond the scope or authority of the Administrator under the Act.

Section 1388.1809 of the Regulation entitled *Evasion* is invalid on its face if the language therein means what it says. That the Administrator relies upon its unconstitutional meaning is apparent from the manner in which it has been applied in the instant case and in the case of *Bowles v. Taylor et al.* previously referred to.

Emergency Court of Appeals in the manner in which they were used herein, and as we have pointed out hereinbefore, petitioner could not protest them nor was there any necessity or excuse for doing so until by application herein against petitioner they proved to be invalid.[9]

It is not true then under any theory that the Regulation has been found to be valid "in all respects" as claimed by counsel for the government. Nor is it true that petitioner has had his full day in Court upon his challenge to the validity of the Regulation. On the contrary, petitioner has as yet been denied any adjudication of constitutional issues relating to the validity of the Regulation which are determinative of the present case (Supp. Tr. 2-41). Petitioner has not waived or forfeited his constitutional right to such adjudication as it was held by this Court that the petitioners in the *Yakus* and *Rottenberg* cases had done (Supp. Tr. 2-3) and having applied the procedure set up by the Act for the adjudication of these matters in three protests and two complaints to the U. S. Emergency Court of Appeals, petitioner is able to establish that due process is not afforded thereby especially as related to a criminal trial and in the instant case. (Supp. Tr. 4-21, 34-41.)[10]

---

[9]Petitioner has now raised these questions and seeks adjudication of the constitutional questions involving the validity of the Regulation which are peculiar to the instant case, in Protest MR28-31-P which was duly filed under Section 203 of the Act when it became apparent from a denial of rehearing by the Circuit Court that these questions should be presented to the Emergency Court of Appeals.

[10]Congress has recognized this fault in the basic law and has now provided in the Stabilization Extension Act of 1944, that any defendant in a civil or criminal proceeding brought pursuant to Section 205 of the Act may obtain a stay in the proceedings during the pendency of specified protests or complaints in the Emergency Court of Appeals. These provisions are not retroactive however and provide no relief to this petitioner.

From all the foregoing it is clear that there is no meri
in the government's contention on page 12 of its Brie
that petitioner is foreclosed by the decision in *Taylor*
Brown from offering a defense based upon the invalidit
of the Regulation. The Court in *Taylor v. Brown*, in th
first paragraph of its opinion specifically stated:

> "We are thus called upon to consider the constit
> tional validity of the Act and Regulation *general*
> *and without regard to their particular application*
> *the complainant.*" (Our emphasis.)[11]

Thus even though the Regulation had not been so ra
cally amended as to make it clearly invalid, and irresp
tive of all such amendments, petitioner was deprived
adjudication of its validity *as it was applied to petitio*
in the instant case, notwithstanding that he attempted
place these matters before the Emergency Court in *Ta*
v. Brown, supra. (Supp. Tr. pp. 7 (part (d)), 37 (p
(e))-39.)

II.

Under point II (Br. for U. S., pp. 12-13) counsel err
ously asserts that petitioner:

> "was not under any disability or handicap"

by reason of the fact that he, a layman, was without c
sel at the trial. Counsel asserts that petitioner

> "was, rather, the 'shrewd and experienced' la
> whom this Court has recently held to be compete
> waive trial by jury altogether in a prosecutio
> serious crime."

---

[11]For discussion of this case and the foregoing quotati
Supplemental Transcript of Record, pages 36-39, 7-8.

citing the case of *Adams v. U. S., ex rel. McCann*, 317 U. S. 269, 278.

There is no support in the record for such an assertion and the entire record indicates the contrary. (R. 220 (13) (15), 204-206.) Counsel cites the statement of the trial judge (R. 181) in support of the proposition that petitioner was treated with especial consideration (because he was without counsel). The record clearly shows to the contrary. The Court in fact took an active part in prosecuting the case *against* petitioner. As for example, the Court persisted in questioning witnesses as to whether there had been any improvements or changes in their apartments *after* they had moved in, in cases where they moved in after July 1, 1942, over the objections of petitioner, and we quote from the record:

> "MR. TAYLOR. It doesn't matter whether there was anything put in after she went in or not. The changes to be effective under the rent regulation must be between March 1st and July 1st.
>
> THE COURT. Overruled. Were there any changes made in the apartment after you moved in?" (R. 56.)

Other instances of such erroneous and highly prejudicial questioning occurred throughout the trial. (R. 49, 55, 58, 61, 62, 63, 65, 67, 68, 75, 78, 79.) The Court took a most active part in the prosecution; made highly prejudicial statements and did not properly protect petitioner from such statements on the part of the district attorney. (R. 177-178, 185, 71-72, 122, 204-205, 220.) Although the Court assumed the responsibility of giving proper Instructions to the jury (Supp. Tr. 44-45) the Instructions given were highly improper and erroneous (R. 181-195) and the Court

refused to give the Instructions proposed by petitioner. (R. 196-198.)

The foregoing matters are ones which should be considered when the case is tried on its merits and the foregoing references are indicated only for the purpose of showing that petitioner was in fact under a severe handicap, contrary to the assertion of counsel for the government.

The facts in *Adams v. U. S. ex rel. McCann, supra,* which was cited by counsel for the government were entirely different, and the conduct of the Court in relation to the matter was in strong contrast to the instant case. In the *Adams* case the defendant answered, when asked by the judge whether he had counsel, that he wished to represent himself, and we quote:

> "In response to the Court's further inquiry whether he was admitted to the bar, McCann 'replied that he was not, but that he had studied law, and was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney could ever be' McCann 'then moved to have the case tried without a jury by the judge alone. There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney,' after which McCann submitted the following (*writing*) over his signature: 'I, Gene McCann, the defendant herein, appearing personally, do hereby waive a trial by jury in the above-entitled case, *having been advised by the Court of my constitutional rights.*' "

In the instant case, the waiver was initiated by the trial Court and no explanation was made of petitioner's rights.

(R. 95.) Petitioner might well have been induced to answer "yes" in the belief that if he did not do so the Court would simply wait or continue the trial until the missing juror arrived, and that by refusing to assent, he, the petitioner would be prejudiced in the eyes of the jury and the Court. While it is true that the offenses charged were not felonies, the penalty on conviction on all counts charged could have been $105,000.00 fine and twenty-one years in prison. (Section 205(b) of the Act.)

III.

The matters covered under point III, pp. 13-14 of the Brief for United States have in large part been answered under point I hereof.

(a) Counsel asserts (p. 14) that the question of whether the Regulation is unlawfully vague and uncertain is one which may be raised only by following the procedure prescribed by Sections 203 and 204 of the Act, but counsel then proceeds to argue the merits of the contention notwithstanding his assertion that this Court may not consider this matter. The grounds upon which it is asserted that the Regulation is unlawfully vague and uncertain are set forth in the Supplemental Transcript, pp. 26-32 at 28 and 29. Until these questions have been adjudicated by a Court competent to rule on the question of whether *in the instant case* the petitioner has or has not been deprived of due process by reason of the vagueness charged, petitioner has been deprived of adjudication of fundamental questions of law determinative of

the case. It cannot be (and never has been) urged that petitioner has forfeited his right to such adjudication by failure to apply the procedure provided by the Act. On the contrary, as shown in point I hereof, petitioner has made repeated efforts to obtain an adjudication of these matters and is still seeking such adjudication. (See footnotes 5 and 9 under point I hereof.) The fact that the trial Court and the circuit Court were each deprived of the right to consider these questions by Section 204 of the Act is the basis of the first three Questions presented herein. (Petition, pp. 2-3, see also Reasons Relied on for Granting the Writ, pp. 12-13.)

It is obvious that these questions, which were reserved in the *Yakus* case should be decided here. A favorable decision from the Emergency Court of Appeals, which may not come until long after the petitioner shall have served his sentence, cannot protect or conserve petitioner's constitutional right herein.

(b) In the Argument, point III, pp. 14, 15, counsel erroneously asserts that Section 205(b) of the Act prescribes criminal sanctions only for willful violations,[12]

---

[12]The first clause of Section 205(b) of the Act prescribes criminal sanctions for willful violation of Section 4 of the Act, but thereafter criminal sanctions are also provided against any person who makes any statement or entry false in any material respect in any document or report required under Section 2 of the Act. For this latter provision there is no defense of innocent intent. As applied to petitioner, if it should be ultimately determined that the improvements (which he made and subsequently registered as "major capital improvements") were not major capital improvements, petitioner could be prosecuted on 48 counts carrying a maximum penalty of 48 years imprisonment and $240,000.00 fine. Thus under Section 205(b) a landlord may be made guilty of a crime by a subsequent ruling that the improvements claimed were not actually major capital improvements under the Regu-

erroneously seeks to imply that the trial Court correctly instructed the jury concerning this element of willfulness.[13] and erroneously states:

> "The verdict of the jury settles the question of the petitioner's knowledge that he was violating the Regulation."

In view of the improper evidence placed before the jury (see point II hereof) and the instructions set forth in footnote 13 wherein the Court instructed the jury that:

> "Wrongful acts, knowingly or intentionally committed, can not be justified on the ground of innocent intent." (R. 188.)

and

> "The law presumes that every person intends the natural and ordinary consequence of his act." (R. 188.)

---

lation. Official O.P.A. Interpretation 4(d)-I, which is set forth in the Appendix to the Petition on page vi, makes mention of this risk by the following language:

> "Where the question whether there has been a major capital improvement is a close one, the landlord may not wish to take the risks involved in making his own determination of the question."

These matters as related to petitioner have been raised in Protest MR28-31-P which is now pending before the Administrator.

[13]The instruction in question contains the following language (R. 188):

> "In determining whether or not any criminal intent existed at the time of the commission of the offense charged, I instruct you that it is your duty to weigh all of the evidence and judge each and every circumstance surrounding the offense charged, including the defendant's motive or lack of motive, if any. *You are instructed that the law presumes that every person intends the natural and ordinary consequence of his act. Wrongful acts, knowingly or intentionally committed, can not be justified on the ground of innocent intent.*"

Exception was allowed to the foregoing instruction. (Supp. Tr. 44-45 at 45.)

it is obvious that no such inference can be drawn from the verdict of the jury. In fact, the recommendation of leniency (R. 108) would lend weight to a contrary view.

The foregoing Instructions are plainly erroneous in the instant case.

(See 23 C. J. S. 1198 and cases there cited.)

(c) As to the remaining questions involving the Instructions to the jury, counsel for the government has apparently misconceived the theory upon which petitioner based his defense at the trial. We will here consider only those matters applicable to the points raised by counsel.

(1.) One of the defenses of petitioner was that he did not "demand and receive" from his tenants the amounts stated in the Information "as and for rent", nor any amount "as and for rent" in excess of March 1, 1942, rents. The evidence in support of this defense is overwhelming and there is none to the contrary. Evelyn Flynn testified that she had purchased the furniture in the apartment house in good faith on June 6, 1942, that she controlled the furniture and had complete charge thereof (R. 85-86) and that the total amount received on the furniture over March 1, 1942, was $309.00 per month. (R. 98.) Petitioner's testimony and the Government's Exhibit No. 1 also substantiated this fact as did all the Tenancy agreements, rental receipts, and statements. (R. 46, 176, 47-84.) No tenant testified that the total amounts had been demanded or received by *Petitioner* as or for rent. All recognized Mrs. Flynn's ownership of the furniture. (R. 45-84.)

In view of the forgoing it was error for the trial Court to instruct the jury:

"I instruct you that it is immaterial whether or not you find there was a *bona fide* sale, transfer or change in ownership of the furnishings * * * . and *you should, therefore, disregard evidence relating to said change of ownership.* * * * *the ownership of the furnishings and equipment used in the accommodations, and supplied to the tenants, is immaterial,* * * * ." (R. 190.)[14]

t is improper to give an instruction which in effect with-lraws a theory of the case supported by the evidence.

23 C. J. S. 1190, pp. 734-735.

(2.) In attempting to sustain the trial Court in its re-usal to give the Instructions requested concerning Sec-ion 1388.1805(d) of the Regulation, and Sections 205(e) nd 205(f)(2) of the Act, counsel and the lower Court ave not only ruled contrary to the Official Interpreta-ion relating thereto (Int. 4(d)-I) in the case of the Regu-

[14]The Instruction, here quoted in part, was designed to instruct he jury relating to the change from furnished to unfurnished. 'etitioner has never contended that the sale of furniture to Evelyn Flynn in and of itself changed the apartments from urnished to unfurnished. Petitioner *does* contend however that here *was* a change from furnished to unfurnished. (R. 46, 94, 13, 50, 53-84, 150-151.) Petitioner's contention is based upon the act that the Regulation governs the relationship between the andlord and the tenant and is a restriction upon the landlord. f the landlord supplies the furnishings in an apartment then it s a furnished apartment, but if he disposes of his furnishings nd enters into a new rental agreement with his tenants whereby ney recognize that the landlord no longer owns the furnishings nd they rent the apartment from the landlord as an unfurnished partment, then there most certainly has been a change in the elationship between the landlord and tenant. Obviously the land-ord might have sold the furniture to the tenant or to a third arty who might have moved it out of the apartment. The owner-hip of the furniture is therefore very material, and the Instruc-on was erroneous both as relating to the change from furnished unfurnished and because it, in effect, withdrew from the case he theory of defense here stated under (1).

lation, and contrary to the plain grammatical sense in the case of Section 205(f)(2) of the Act, but they have entirely overlooked or disregarded the theory of defense on which the Instructions were requested.

These instructions and each of them were requested by petitioner in support of his defense that he had no criminal intent, or knowledge that the alleged offenses were in fact crimes, and in support of his contention that the prosecution was in fact a persecution. (R. 159.) Obviously where as in a case like this there is no dispute whatsoever as to the basic facts, the strong presumption is bound to arise in the minds of the jury that if there was no crime involved in the known facts, there would have been no prosecution. The Instructions requested, together with the evidence, would have tended to combat or offset this presumption.

Petitioner established that no findings of fact, no warning notices, no orders, had been issued to him or to Evelyn Flynn by which they could know that in charging the first rents after the installation of the laundry equipment, they were violating the regulation. (R. 95, 180.) Petitioner maintained that there had been no illegal collection of rents (R. 178), that notwithstanding that he still believed the Regulation unconstitutional, he was voluntarily complying therewith and intended to comply. (R. 114, 116, 122, 152, 155, 157-158, 164.) Counsel for the government has referred to a letter written by David C. Dunlap, attorney for the Office of Price Administration, which letter was received by petitioner on August 12, 1942. (R. 107-109.) In this letter the attorney stated, among numerous other matters contained therein, that

e sale of furniture from petitioner to Mrs. Flynn did t constitute a change from fully furnished to unfur-ished. No mention was made in this letter of major pital improvements. Following this letter, petitioner on ugust 14, 1942, wrote a letter in answer thereto, which tter is set forth in the record. (R. 111-115.) In this letter titioner fully explained his position in relation to the ange from furnished to unfurnished, showing that it s based upon the rental agreements with the tenants. . 113.) On August 27, 1942, petitioner voluntarily trans-rted said David C. Dunlap to the Apartment House and petitioner's office and voluntarily showed Mr. Dunlap contracts and records (R. 116, 153-154) and in a writ-stipulation concerning two typical apartments claimed major capital improvement in connection therewith, ich said major capital improvement referred to the ndry equipment which was installed on June 27, 1942. . 154, 117, see excerpt from Exhibit 2-B, Appendix to tition, part II, p. x.)

As indicated by the record, there was no objection sed by the Office of Price Administration to the man-r in which petitioner was operating after the letter of ugust 14, 1942, in which petitioner explained his po-ion. There was never any objection at any time (within previous to the times covered by the Information) to classification of the laundry equipment as a major pital improvement. No tenant except Havercroft had de any protest over the rent and Havercroft had finally d the rent following a conference between Mr. Dunlap d petitioner. (R. 95, 73, 72.)

The instructions requested clearly disclosed by reciting specified sections of the Regulation and the Act, that (a) there was a procedure whereby any disputes or doubts concerning disputed maximum legal rentals could be resolved, and that it was the function of the Administrator to fix the maximum rent by the entry of an order determining such facts (Section 1388.1805(d) of the Regulation), (b) that there was a provision in the law itself Section 205(f)(2), whereby it was the duty of the Administrator to send a warning notice by registered mail to any person whenever in the judgment of the Administrator such person had violated

> "any of the provisions of any regulation * * under Section 2 * * * ."

(Section 2 of the Act authorizes the Rent Regulation here involved), (c) that there was a provision in the law by which any tenant, who had paid as rent a sum greater than that permitted by the regulation, could bring suit for the recovery of $50.00 or treble the overcharge, whichever was the greater.

The fact that petitioner had been permitted to continue renting for five months without notice or order notwithstanding that the method of operation was known to the Administrator, and the further fact that the tenants of 48 apartments had paid the alleged illegal rents for said five months without protest notwithstanding that they had a remedy and relief available to them under the Act raised a strong presumption in favor of petitioner and opposed to the presumption of crime induced by the fact of prosecution. The fact that no notice or warning was given supported petitioner's contention of innocent in

tent and lack of knowledge of any crime. The Instructions requested contained nothing more than a statement of the law.

Where proper request is made for an instruction which correctly propounds the law and is warranted by the evidence and pleadings in the case, it is the duty of the Court to give it, and a refusal thereof will constitute error.

23 C. J. S. 1337.

Where there is doubt as to the propriety of granting instructions, it should be resolved in favor of the accused.

23 C. J. S. 1334.

It is improper to refuse to instruct on a theory which the evidence tends to support.

23 C. J. S. 1190 (p. 735).

(3.) The Instruction concerning the major capital improvement (R. 190) was erroneous. The capital improvement was admitted and the question as to whether it constituted a "major" capital improvement under the regulation was a question of law and should not have been submitted to the jury. If the Court wished to refer to the improvement in its instructions, the term "major capital improvement" should have been defined.

Terms used in instructions should be defined by the Court where they have a technical meaning or may be misapplied by the jury.

23 C. J. S. 1191.

The submission of the matter at all was inconsistent and improper in view of the evidence and ruling of the trial Court. (R. 94, referring to Government's Exhibit No. 1 admitted in evidence, R. 45.)

CONCLUSION.

We have shown that this case does present the que
tions which were reserved in *Yakus v. U. S.*, 321 U. S. 4
which we have set forth on pages 2 and 3 of the Petiti
herein, and that the decision of the Circuit Court
Appeals has so far departed from the accepted and usu
course of judicial proceedings, and has so far sanction
such a departure by the lower Court as to call for an
ercise of this Honorable Court's power of supervision.

We respectfully submit that the writ should be grant

Dated, San Francisco, California,
September 8, 1944.

C. M. WALTER of WALTER & BROWN
JOHN C. STIRRAT,
Counsel for Petition

(15)

Office - Supreme Court, U. S.
FILED
NOV 3 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 229

STANLEY TAYLOR, *Petitioner*,

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

C. M. WALTER,
1419 Broadway, Oakland, California,
JOHN C. STIRRAT,
206 Sansome Street, San Francisco, California,
Counsel for Petitioner.

PARSAL-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Argument	4
Conclusion	12

Table of Authorities Cited

Cases

	Pages
Bowles v. Willingham, 321 U. S. 503	2n, 4, 5, 8
Lockerty v. Phillips, 319 U. S. 182, 87 L. Ed. 1339	2n, 4
Louisville & Nashville R. Co. v. Stockyards Co., 212 U. S. 132	10
Roller v. Holly, 176 U. S. 398	10
Stanley W. Taylor, Petitioner v. Chester Bowles, Price Administrator, Respondent, No. 161 (U.S.E.C.A.)	9
Taylor v. Brown, 137 F. (2d) 654	2n, 5, 6, 7, 8
Yakus v. U. S., 321 U. S. 414, 88 L. Ed. 653	2n, 4, 5

Miscellaneous

Emergency Price Control Act of 1942:	
Section 4(d)	6
Section 203	9
Section 203(d)	9
Section 1388:1804(d)(4)	6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 229

STANLEY TAYLOR, *Petitioner,*

vs.

UNITED STATES OF AMERICA

---

n Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

---

o the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Comes now the petitioner Stanley Taylor, by his attorneys, and prays that this Honorable Court rehear and reconsider his petition herein which was denied by the Court on October 9, 1944.

The grounds upon which petitioner bases his prayer are as follows:

1. The denial of certiorari herein, to the extent that it makes final the judgment of the Circuit Court, unconstitutionally deprives this petitioner

(a) of the right to defend and preserve his liberty and property in a criminal prosecution on the ground that the regulation which he is accused of violating is unconstitutional on its face and as applied therein,[1] and

(b) of the right and opportunity to obtain a determination of the validity of the regulation and the procedure *prior to the imposition of punishment,*

notwithstanding that petitioner has not waived or forfeited his right to such defense or adjudication by failure to make

---

[1]In sustaining the validity of the Emergency Price Control Act of 1942, the majority opinion in *Yakus v. U. S.*, 321 U. S. 414, 88 L. Ed. 653, reserved the question as to whether an accused might constitutionally be deprived of this defense. This question was also reserved in *Bowles v. Willingham*, 321 U. S. 503, in the concurring opinion of Mr. Justice Rutledge, and by the Court in *Lockerty v. Phillips*, 319 U. S. 182, 87 L. Ed. 1339.

The Emergency Court of Appeals also refused to pass upon this feature of the Act when the question was raised by petitioner in *Taylor v. Brown*, 137 F. (2d) 654.

Concerning this matter, Mr. Justice Rutledge stated in his dissent in the *Yakus* case:

> "Once it is held that Congress can require the courts criminally to enforce unconstitutional laws or statutes, including regulations, *or to do so without regard for their validity*, the way will have been found to circumvent the supreme law and, what is more, to make the courts parties to doing so. This Congress cannot do. * * * whenever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process, more especially in criminal trials." (Our emphasis.)

The foregoing was concurred in by Mr. Justice Murphy, and the principles enunciated there were supported in separate opinions by Mr. Justice Roberts in both the *Yakus* and *Willingham* cases.

ly assertion of such right before the tribunal having sdiction to determine it.[2]

Unless this Honorable Court by a suitable order or ion reserves decision on the matters herein presented preserves the liberty of petitioner until he is able to in adjudication of the constitutional questions here lved by the statutory procedure,[2] this Court will, in ct, be approving:

(a) the taking of private property for private use without due process and without compensation,[3] and

(b) the punishment of petitioner for alleged violations of the regulation without a constitutional trial[4] and notwithstanding that Official O.P.A. Regulations and Interpretations grant immunity and establish that the conviction was erroneous and contrary to law.[5]

Petitioner's protest MR 28-31-P seeking determination of the idity of the regulation as constituted at the times involved ein and as applied to petitioner in this case is still pending ore the administrator. (Petitioner's Reply Brief, note 9, p. 17.)

Petitioner, under the opinion of the Circuit Court and under regulation as enforced against him by the administrator, is pelled to continue renting the property in question and is rived of any compensation for the use of laundry equipment other facilities which were not provided on March 1, 1942, which petitioner is now required to provide. (R. 46, 159-170; pp. Tr. 24, 26.)

Petitioner has as yet been deprived of any adjudication of constitutional questions involving the validity of the regulation which determinative of this case. (Supp. Tr. 21-39; see also Petiner's Reply Brief herein, pp. 6-18.)

See Petitioner's Reply Brief, pp. 2-3.

ARGUMENT.

I.

The first questions presented by this case, and which were specifically reserved by this Honorable Court in *Yakus v. U. S., Bowles v. Willingham,* and *Lockerty v. Phillips* (see footnote 1, p. 2 hereof) are whether the Emergency Price Control Act of 1942 may validly compel enforcement of the regulation in question by the District Court and at the same time deprive said Court of "jurisdiction or power to consider the validity" in the cases such as this where petitioner has duly challenged the validity of the regulation by the statutory procedure and has been unable to obtain a determination thereof either as constituted during the time involved, or as applied to the circumstances of this case.

A further question presented by this case (which was also left undecided in the *Yakus* and *Willingham* cases) is whether the procedure of the Act, compelling a criminal trial to be split into two separate and entirely independent proceedings, is capable of providing due process or a constitutional trial in a criminal case. The majority opinion in each of these cases failed to pass upon this point, holding in the *Yakus* case that it was not presented therein by reason of the fact that the petitioner in that case, having failed to apply the procedure, was not in position to show that it was inadequate. The minority opinions in each case, however, held that the procedure was unconstitutional, particularly as applied to a criminal trial. (See footnote 1, p. 2, hereof, for opinion of Mr. Justice Rutledge in his dissent in the *Yakus* case.)

Coming to the circumstances of the instant case, the question before this Court is whether, as applied herein, the procedure of the Act has afforded due process to this petitioner in the protection of his constitutional right to liberty and the possession and control of his property.

It is plain that in this case the procedure has proven to be totally lacking in due process, for petitioner, although he pursued such procedure diligently, has been deprived of any adjudication of the validity of the regulation as applied in the circumstances of this case.

This petitioner has not waived or forfeited his right to an adjudication on these points above or to a determination of the validity of the regulation, either on its face or as applied herein, as this Court indicated that the petitioners or parties had forfeited their rights in the cases of *Yakus v. U. S.* and *Bowles v. Willingham*, supra. On the contrary, the petitioner herein not only exercised his right of protest against the regulation by following the statutory procedure (R. 115, 121) but challenged the exclusive jurisdictional and procedural features of the Act as well. (R. 136-138.)

On his original protest, petitioner was denied any hearing and deprived of the opportunity to present evidence in support of his assertions which were summarily dismissed by the Administrator without statement of economic data or other facts of which the Administrator had taken official notice. (Supp. Tr. 35-36.) Upon complaint to the Emergency Court of Appeals in *Taylor v. Brown*, 137

F. (2d) 654, following the denial of his original protest, petitioner again challenged the validity of the regulation and the procedure and exclusive jurisdictional features of the Act. (R. 121-147.)

After the complaint in *Taylor v. Brown* was mailed to the Emergency Court (R. 122) the Administrator materially amended the regulations and subsequently (Nov. 9, 1942) brought civil action against petitioner to deprive him of the right to operate his property under Section 1388:1804(d)(4) of the regulation, thus depriving petitioner of any compensation for the use of laundry equipment and other facilities provided for the first time after March 1, 1942, and compelling him to rent rehabilitated and improved premises 25% below the rentals of comparable accommodations. (R. 46, 49, 94, 98, 117, 150, 151, 158, 176, 159-160; also see footnote 5, p. 11 of Petitioner's Reply Brief herein.) The amended regulation compelled the continued renting of the property and when petitioner, subjected to the arbitrary actions above and denied administrative hearing or relief and threatened with "a lot of litigation" by the O.P.A. attorney, sought to withdraw his property from rental under authority of Section 4(d) of the Act, the Administrator brought contempt proceedings against him and required him to continue renting said property. (R. 160-175.) One week after petitioner's attempt to withdraw his property from rental the Criminal Information was filed against petitioner in the present case, charging criminal violations of the regulation prior to the filing of the civil suit and prior to any notice or indication from the Administrator that the improvements in question were not deemed to be major capital improve-

ments by the Administrator. (R. 2-42, 175, 95, 154, 180, 117.)

After these events (the amendments to the regulations and the proceedings taken against petitioner in the civil case and the instant criminal case) petitioner sought to present these matters to the Emergency Court of Appeals in *Taylor v. Brown*, supra, which was then pending, as bearing upon the validity of the Act and regulation. Permission to place these matters before the Court was denied, and subsequently Protest MR 28-31-P was filed by petitioner to obtain an adjudication of the constitutional questions here involved.

In *Taylor v. Brown*, the Court, having denied petitioner the right to file evidence supra, refused to consider the regulation as applied to petitioner or as it was constituted at the times involved herein, stating in the first paragraph of its opinion,

> "We are thus called upon to consider the constitutional validity of the act and regulation generally and without regard to their particular application to the complainant."

The Emergency Court in *Taylor v. Brown* also refused to pass upon the validity of the exclusive jurisdiction features of the Act as applied to a criminal trial, stating:

> "The Act vests in this court jurisdicton to consider the validity of price and rent regulations and by its terms seeks to make that jurisdiction exclusive. We are not called upon to decide, however, whether the provisions of the Act which thus deny similar jurisdiction to all other courts are constitutionally effective to do so, since even if they should be held invalid the

> remaining provisions of the Act would not, in the light of the separability clause of Section 303, be affected thereby."

Certiorari was denied by this Court in *Taylor v. Brown* on the same day that it accepted the case of *Bowles v. Willingham,* which case upheld the Act in part but as we have shown did not settle the questions here presented or establish the validity of the regulation.

It is respectfully submitted that the questions first enumerated under this point and set forth in our original Petition herein (pp. 2-3) are squarely presented by this case and that they should be decided now, before petitioner is subjected to punishment without a complete and proper trial, and not after he has served his term of imprisonment and suffered further financial losses.

II.

By denying certiorari herein without memorandum or opinion, this petitioner and the lower Court are each left without any positive or sure indication as to whether this Court has denied certiorari at this time because the decision and opinion of the Circuit Court is still subject to review and adjudication on constitutional grounds in the U. S. Emergency Court of Appeals pursuant to Protest MR 28-31-P, now pending, or whether the Court was influenced by the erroneous statement of counsel for respondent that

> "the regulation here in question has been found to be valid in all respects". (See our Reply Brief for refuta-

tion of the above quotation, pp. 6-18, and footnotes 9 (p. 17), 1 (p. 7), 5 (p. 11), 12 (pp. 22-23) and 10 (p. 17), all in said Reply Brief.)

As indicated by the references above, we disclosed in Petitioner's Reply Brief filed herein in September, that petitioner had duly filed his Protest MR 28-31-P pursuant to the provisions of Section 203 of the Emergency Price Control Act of 1942 when it became apparent from a denial of rehearing by the Circuit Court that the constitutional questions involved in this case should be presented to the Emergency Court of Appeals. This protest is still pending before the Administrator. All efforts of petitioner to obtain a hearing or a prompt decision on this protest have as yet been without avail. Application for a mandatory order requiring the Administrator to act upon the protest within a time to be fixed by the Court was filed by petitioner in the U. S. Emergency Court of Appeals on September 8, 1944, pursuant to the provisions of Section 203(d) of the Emergency Price Control Act of 1942 as amended by the Stabilization Extension Act of 1944, approved June 30, 1944. (Pub. Law 383—78th Congress, Ch. 325—2d Session.) The cause was there docketed and entitled *Stanley W. Taylor, Petitioner v. Chester Bowles, Price Administrator, Respondent*, No. 161 (U.S.E.C.A.), and was denied by the Emergency Court on September 21, 1944, upon a showing by the Administrator that he was proceeding in the consideration and disposition thereof.

Although the Emergency Price Control Act of 1942 as amended by the Stabilization Extension Act of 1944 (supra) provides for a stay in criminal and civil proceedings during the pendency of specified protests and reviews

in the Emergency Court of Appeals, as stated in our Reply Brief, footnote 10 (p. 17), these provisions are not retroactive and provide no relief to this petitioner.

Thus is emphasized the denial of due process to which this petitioner is subjected by the exclusive jurisdictional features of the Act as originally enacted. He may in this case be subjected to punishment before he has been able to obtain adjudication of the validity of the regulation as applied herein, notwithstanding that he has diligently sought and is still seeking such adjudication by the statutory procedure. It is true that the Circuit Court *may* grant a stay of mandate herein pending the disposition of the aforedesignated protest and any appeal therefrom to the Emergency Court, but such stay is not authorized by the Act in cases such as this where judgment was rendered under the Act prior to amendment.

> "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."
>
> *Roller v. Holly,* 176 U. S. 398, 409.

> "The law itself must save the parties' rights and not leave them to the discretion of the courts as such."
>
> *Louisville & Nashville R. Co. v. Stockyards Co.,* 212 U. S. 132, 144.

While the authority and jurisdiction of the Emergency Court of Appeals extends to the determination of the validity of orders and regulations issued by the Administrator, that Court has not been granted jurisdiction to set aside a judgment of a District Court or Circuit Court in a criminal case, and under the Act as originally enacted

re was no connection or link between the jurisdiction the District Court over criminal violations and the lusive jurisdiction of the Emergency Court for the ermination of the validity of orders and regulations. us although the Emergency Court of Appeals may ultitely find that the regulation as applied in the instant se is invalid, such a decision may not be recognized by District Court or the Circuit Court herein, and obvisly if petitioner has already served his sentence, it cant preserve his rights whether it be recognized or not.

III.

Certiorari should be granted now or jurisdiction of the se should be preserved by this Honorable Court pending e determination of the questions over which the Emerency Court has exclusive jurisdiction and which are still ending before the Administrator in Protest MR 28-31-P. etitioner has not waived his right to the determination these questions and their determination is not barred any statutory or other limitations.

This Court should preserve jurisdiction if it does not rant certiorari now for as we have pointed out in the etition (pp. 10-22) and in Petitioner's Reply Brief (pp. -5, 18-30), the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proeedings, and has so far sanctioned such a departure by he trial Court as to call for an exercise of this Honorable Court's power of supervision. As to the matters not inolving the validity of the regulation it is obvious that he Emergency Court of Appeals has no jurisdiction and

those matters should be reviewed by this Court. Nor should the Emergency Court of Appeals be compelled to find the regulation invalid on the basis of the opinion of the Circuit Court, when, as ordinarily construed, the regulation may be capable of providing due process. The manner in which the opinion of the Circuit Court forces invalidity in the regulation when as ordinarily construed it might be valid, is set forth in the Supplemental Transcript herein. (Supp. Tr. 26-34.)

CONCLUSION.

This Court should grant certiorari in this case at this time or should enter a suitable order or opinion whereby it preserves jurisdiction hereof and preserves the liberty of petitioner pending adjudication of the constitutional issues here involved in the Emergency Court of Appeals pursuant to Protest MR 28-31-P.

Notwithstanding the ordinary practice in this Court, petitioner suggests, that because of the extent of the record and collateral pertinent proceedings, and the complications of the law and regulations involved, it may be helpful to the Court to have oral argument hereon, and in all events petitioner prays that such oral argument be granted before any order is entered denying this petition.

All of which is respectfully submitted.

Dated, San Francisco, California,
October 31, 1944.

C. M. WALTER,
JOHN C. STIRRAT,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for petitioner in the above entitled cause and that in my judgment the foregoing petition for rehearing is well founded in point of law as well as in fact and that said petition for rehearing is not interposed for delay.

Dated, San Francisco, California,
October 31, 1944.

C. M. WALTER,
Of Counsel for Petitioner.